LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 15 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1295

DEATON, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

ANDREW J. THOMAS
C. V. STELZENMULLER
1600 Bank for Savings Building
Birmingham, Alabama 35203
Counsel for Petitioner

April 14, 1975

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions and Regulations Involved	3
Statement of the Case	3
Reasons for Granting the Writ	12
1. The Decision Below Conflicts With the Decision of this Court in Weinberger v. Wiesenfeld, — U.S. —, 43 U.S.L.W. 4393 (March 19, 1975)	12
2. The Decision Below Conflicts with United States v. Silk (Harrison, Collector of Internal Revenue v. Greyvan Lines, Inc.), 331 U.S. 704 (1947)	21
3. The Court of Appeals for the Fifth Circuit Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision	21
Conclusion	22
Appendix	
Excerpts From 49 CFR Parts 390-397, 1057-1058	A-1
NLRB Decision and Direction of Election Dated January 11, 1971 (NLRB Case No. 10-RC-8115, 187 NLRB 780)	A-82

NLRB Administrative Law Judge's Decision Dated January 31, 1973 (NLRB Case No. 10-CA-9765, 203 NLRB No. 172) A-97

NLRB's Decision and Order Dated June 1, 1973 (NLRB Case No. 10-CA-9765, 203 NLRB No. 172) A-107

NLRB's Order Denying Request for Reconsideration by Entire Board (NLRB Case No. 10-CA-9765, 203 NLRB No. 172) A-109

Opinion of U.S. Court of Appeals for the Fifth Circuit Dated October 25, 1974 (Case No. 73-3084, 502 F. 2d 1221) A-110

Order Correcting Opinion and Denying Rehearing En Banc, Dated January 15, 1975 ..... A-125

Judgment Dated November 21, 1974, Issued as Mandate January 23, 1975 ..... A-126

CITATIONS

Cases

Ace Doran Hauling & Rigging Co., 191 NLRB 428 (1971), enforced NLRB v. Ace Doran Hauling & Rigging Co., 462 F. 2d 190 (6th Cir., 1971) 19

Ace Doran Hauling & Rigging Co., 214 NLRB No. 84, 87 LRRM 1525 (1974) 19

Aetna Freight Lines, Inc., 194 NLRB No. 120, 79 LRRM 1042 (1971) 18

Boxwood, Inc., 209 NLRB No. 8, 85 LRRM 1278 (1974) 18

Chicago & A.R. Co. v. Kirby, 225 U.S. 155 (1912) 7

Columbus Green Cabs, 214 NLRB No. 93, 87 LRRM 1375 (1974) 18

Conley Motor Express, 197 NLRB No. 57, 80 LRRM 1399 (1972) 17

Dailey Express, Inc., 211 NLRB No. 19, 86 LRRM 1355 (1974) 18

Deaton, Inc., 187 NLRB 780, 76 LRRM 1129, 71 LC ¶ 22,635 (1971) 2, 7, 21

Deaton, Inc., 203 NLRB No. 172, 83 LRRM 1294, 73 LC ¶ 25,421 (1973) 2

Deaton Truck Line, Inc. v. NLRB, 337 F. 2d 697 (5th Cir., 1964), cert. denied sub nom. Teamsters Local 612 v. NLRB, 381 U.S. 903 (1965) 5

Eck Miller Transportation Corp., 211 NLRB No. 12, 87 LRRM 1409 (1974) 18

Fleet Transport Co., 196 NLRB No. 61, 80 LRRM 1047 (1972) 16

Fraley & Schilling, Inc., 211 NLRB No. 49, 87 LRRM 1378 (1974) 18

George Transfer & Rigging Co., 208 NLRB No. 25, 85 LRRM 1097 (1974) 18

Kreitz Motor Express, Inc., 210 NLRB No. 11, 86 LRRM 1217 (1974) 18

Local 814, Teamsters (Santini Bros., Inc.), 208 NLRB No. 22, 85 LRRM 1518 (1974) 18

NLRB v. Deaton, Inc., 502 F. 2d 1221, 82 LRRM 2545, 88 LRRM 2384, 75 LC ¶ 10,407 (5th Cir., 1974) ...1, 12

Pilot Freight Carriers, Inc., 108 NLRB No. 138, 85 LRRM 1179 (1974) 18

Pony Trucking, Inc., 198 NLRB No. 59, 81 LRRM 1249 (1972), enforced NLRB v. Pony Trucking, Inc., 486 F. 2d 1039 (6th Cir., 1973) 17

Portage Transfer Co., 204 NLRB No. 117, 83 LRRM 1398, 1400 (1973) 18

Tryon Trucking, Inc., 192 NLRB No. 123, 78 LRRM 1132 (1971) 17

United States v. Silk (Harrison, Collector of Internal Revenue v. Greyvan Lines, Inc.), 331 U.S. 704 (1947) 2, 4, 15, 21

Weinberger v. Wiesenfeld, — U.S. —, 43 U.S.L.W. 4393 (March 19, 1975) 12

Yellow Cab Co., 208 NLRB No. 121, 85 LRRM 1273 (1973) 18

Statutes

28 USC § 1254(1) 2

29 USC § 152(3), 61 Stat. 137 ..... 3, 4

Regulations:

49 CFR Parts 390-397, 1057, 1058 .....3, 6, 20

Miscellaneous

13 Am. Jur. 2d, Carriers § 364 7

Miller, Gerry M., "The Uses of the Past at the Miller Board," Southwestern Legal Foundation, Labor Law Developments 1974, 163, 164, 167, 170-172, 187 14

U.S. Constitution, Amendment V 3, 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. .....

DEATON, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

The petitioner, Deaton, Inc., a corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this cause on October 25, 1974, as corrected on rehearing January 15, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 502 F. 2d 1221, 82 LRRM 2545, and 75 LC ¶ 10,407. The order correcting an erroneuos factual statement in said opinion and deny-

ing rehearing en banc is incorporated in the opinion reported at 502 F. 2d 1221, and separately reported at 88 LRRM 2384. The decision of the National Labor Relations Board ordered by the Court of Appeals to be enforced, is officially known as 203 NLRB No. 172 and unofficially reported at 83 LRRM 1294 and 73 LC ¶ 25,421 (1973). The decision of the National Labor Relations Board directing the election which was the basis of the decision last cited is reported officially at 187 NLRB 780 and unofficially at 76 LRRM 1129 and 71 LC ¶ 22,635 (1971). All these opinions and decisions together with the judgment sought to be reviewed are printed in the Appendix to this petition as part of this volume.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 21, 1974. A timely petition for rehearing en banc was denied on January 15, 1975, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. ¶ 1254(1).

QUESTIONS PRESENTED

1. Whether it is not a denial of due process of law for the Court of Appeals to adjudge that it is immaterial, upon judicial review of an order of the National Labor Relations Board, that other Board cases reach an opposite result on truly indistinguishable facts, as to whether owner-operator truck drivers of ICC-certificated carriers are employees or independent contractors?

2. Whether *United States v. Silk*, 331 U.S. 704 (1947), is still the law?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall . . . be deprived of life, liberty or property, without due process of law . . . ."

29 U.S.C. § 152(3), 61 Stat. 137:

"§ 152. *Definitions*

"When used in this subchapter—

* * * * * * *

"(3) The term 'employee' . . . shall not include . . . any individual having the status of an independent contractor . . . ."

The Motor Carrier Safety Regulations promulgated by the U. S. Department of Transportation, 49 CFR Parts 390-397, inclusive, are to some extent involved in this case and the excerpts from them which we deem pertinent are printed as a part of the appendix in this volume.

The Interstate Commerce Commission Rules pertaining to Lease and Interchange of Vehicles and Identification of Vehicles, 49 CFR Parts 1057 and 1058, are to some extent involved in this case and are printed as a part of the appendix in this volume.

STATEMENT OF THE CASE

Deaton, Inc. is an irregular route common carrier which is engaged in the carriage of goods for hire in several southeastern states, operating under the authority granted in a certificate of

the Interstate Commerce Commission. The over-the-road truck-drivers operating trucks under its authority comprise these classes of persons:

Drivers of Deaton-owned trucks, conceded to be its employees.

Owner-drivers. These individuals own one or more trucks, which they lease to Deaton and drive one of these trucks regularly or intermittently. They are paid by Deaton a percentage of revenue as rent, and are not paid separately for driving.

Non-owner drivers of leased trucks. These individuals drive trucks leased to Deaton by owner-drivers or other persons, and are paid by them, being paid nothing by Deaton.

In 1971, Service Employees International Union, local No. 623, AFL-CIO, petitioned the National Labor Relations Board for Certification as bargaining representative of a unit of persons including all three of the above classes of persons. Deaton, Inc. contended that only the first of these classes were its employees within the meaning of the Labor-Management Relations Act. 29 U.S.C. § 152(3), 61 Stat. 137, and that the bargaining unit sought was therefore inappropriate.

The National Labor Relations Board decided by a vote of 3 to 1 that all three classes were Deaton's employees and ordered an election. Chairman Miller dissented on the ground that:

> "When the instant record is measured against the standards set forth in *Greyvan* [*United States v. Silk*, 331 U.S. 704 (1947)] and the legislative history to the 1947 amendments, the lease owners must be found to be independent contractors."

Following an election in which all three classes were permitted to vote, the Board certified the Union as bargaining representa-

tive of the unit it had petitioned for. Thereafter Deaton informed the Union that it would not bargain to set the wages, hours and fringes that were controlled by the lessors who paid the third class of drivers, that it was not willing to make the concession of exercising control over that particular area. A charge followed that Deaton had unlawfully refused to bargain, the Board issued a complaint, and found Deaton guilty of the charge, Chairman Miller again dissenting on the ground that "I consider the lease owners involved herein to be independent contractors rather than employees of the Respondent [Deaton]."

The facts material to the consideration of the questions presented in this petition may be stated as follows. Following a decision in 1964 that Deaton's owner-operators were its employees, *Deaton Truck Line, Inc. v. NLRB*, 337 F. 2d 697 (5th Cir., 1964), cert. denied sub nom. *Teamsters Local 612 v. NLRB*, 381 U.S. 903 (1965), Deaton proceeded to renegotiate its truck leases to make it explicit that the relationship was that of independent contractors and that the control which Deaton had the right to exercise over drivers of leased trucks was to be the minimum consistent with the Department of Transportation and Interstate Commerce Commission regulation found in the appendices to this petition. These regulations are quite extensive and Deaton is required to comply with them just as any other certificated carrier must.

Both the Board and the Court below were unwilling to conclude that DOT-ICC mandatory requirements as a matter of law precluded the possibility of an independent contractor relationship between any certificated carrier and owner-operators. Therefore they both enumerated in their opinions a list of "controls" which assertedly were "additional" to those required by regulations, but which in fact are virtually all mandatory requirements. For example, the Board's opinion cited these factors controlled by the carrier:

Initial determination of qualification of any driver hired by a lease owner (required by 49 CFR §§ 390.31-.32, 391.11,-.21,-.23,-.35,-.41, 1057.5(e)).

Disqualification of any driver who fails to perform satisfactorily (required by 49 CFR §§ 391.15,-.25, 392.4,-.5).

Requiring leased equipment to be inspected every 20 days (required by 49 CFR § 396.2,-.9).

Exclusive use of all leased equipment for the term of the lease (required by 49 CFR § 1057.4(a)).

Requiring drivers of leased trucks to submit a daily driver's log, trip report and manifests (required by 49 CFR §§ 390.32, 395.8, 396.7, 396.9, 1057.5(f)).

Requiring leased trucks to bear Deaton's name and an identification number (required by 49 CFR §§ 1057.5(e), 1058.1,-.2,-.3).

Maintaining a personal file on all drivers with respect to accidents and qualifications (required by 49 CFR §§ 391.51,-.25,-.27).

Investigating accidents of all drivers (required by 49 CFR § 394.10).

The Court of Appeals' opinion goes to some pains to contend that Deaton's investigation of drivers' qualifications exceeds the bare minimum required by the DOT regulations and may involve a subjective element "different in quality from merely making sure he was not barred by law from commercial driving." But this is precisely what the regulations require, an in depth investigation which includes subjective opinion judgments and the type of evidence a reasonable man would seek to get assurance of safe driving qualifications and habits, not bare paper qualifications. See, for example, 49 CFR § 391.-23(c).

The only factors which could arguably constitute controls not required by these regulations, are matters which are essential to operating any truck line, be it with employee drivers or independent contractor drivers. To enumerate these:

Item: "[Deaton's] performance of dispatching services for both company and lease drivers alike." (187 NLRB at 782, infra at A-88) The end result to be accomplished by whatever means is the movement of freight from point A to point B within a reasonable time. Dispatching a truck consists of telling someone what the freight is and where to pick it up and deliver it. These instructions would be the same whether the relation is employment or independent contractor. They pertain to and are essential to the end result. They are equally referrable to either relation. All motor carriers must dispatch all trucks, including all the dozens of carriers whose owner-operators the Board holds to be independent contractors. These are the same kind of instructions one gives to a cab driver or airline ticket agent without any thought that this could even tend to imply an employment relationship. Although the Board said this was an "additional control" the Court said in footnote 9 to its opinion, infra at A-118: ". . . we place no reliance on this factor."

Item: Taking measures, such as threat of lease cancellation, to encourage or induce drivers of leased trucks to deliver shipments within a reasonable time rather than just loafing. It is the common law duty of every common carrier to make deliveries within a reasonable time. 13 Am. Jur. 2d, Carriers § 364; *Chicago & A.R. Co. v. Kirby*, 225 U.S. 155 (1912). The carriers exertion of control over this end result is as referrable to an independent contractor relationship as to one of employment, and is equally necessary.

Item: Taking measures, such as threat of lease cancellation, to curb dishonesty on the part of drivers of leased trucks. But

a motor carrier is required to tolerate stealing no more by independent contractors or their employees, than by its own employees. A carrier is not required to elect between helplessly standing by while being ripped off, and assuming the legal incidents of an employer-employee relation. A housewife who changes dairies because the old milkman cheated her out of money or was habitually late, does not thereby become the milkman's employer. This type of end result control is equally referrable to the independent contractor relationship and no one can seriously suppose that any motor carrier (including the numerous ones which for which other NLRB panels have sustained the independent contractor relation to owner-drivers) would or could act any differently from Deaton in these particulars.

Item: When a shipper tells Deaton that driver X will not be permitted on the shipper's premises, whether because of the driver's misconduct or for whatever reason, if X is a Company-owned truck driver, Deaton will not send him there; and if X is the driver of a leased truck, Deaton gives the lessor the message, and the lessor must then make arrangements for another driver on that shipper's premises, or to have Deaton load the trailer for the lessor. This is a peculiar basis on which to argue that Deaton exercises employment-type control over those drivers; *au contraire*, it involves control exercised by a shipper, or more precisely, illustrates how certain types of control are in real life exercised by persons who no one contends are the employers of the drivers. It is the same as if I order some plumbing service at my house but tell the boss not to send plumber Z and that I will not let him in my house. Whatever this proves, it could not support the argument that Deaton is exercising any control inconsistent with the independent contractor relation; this is exercise of control by the shipper, who is clearly an independent contractor.

In short Deaton's operation is no different from any ICC-licensed motor carrier using leased trucks and exercising the real-

life minimum of controls over the drivers. Deaton's truck leases unequivocally provide that the relation shall be that of independent contractor, and that the lessor shall be the employer of any driver he assigns to the truck:

> "Contractor shall . . . direct and control his employees, including selecting, hiring, supervising, firing, training, setting wages, hours and working conditions and paying and adjusting the grievances of his employees. . . .
>
> "Parties hereto agree that 'carrier' is without authority to control said operation, except to the extent required by law and to accomplish the end result for which this lease is executed."

And in actual fact that is all the control that Deaton exercised at times material. Drivers do not have the same working conditions. Deaton provides group hospital, life, and workmen's compensation insurance on the drivers of company owned trucks, and gives them vacations. It provides none of these to drivers of leased trucks. Many of the lessors give different benefits to drivers of their trucks leased to Deaton such as various plans of hospital insurance, paid vacations and retention of gasoline discounts; these fringes are the result of agreements between the drivers and the lessors who pay their wages, and Deaton is not a party to these agreements. Deaton has no Company rules applicable to drivers of leased trucks. Lessors may sign the dispather's log and assign any of the drivers on their payroll to take the load. Deaton does not reprimand drivers of leased trucks, conducts no safety meetings for them, exercises no control over extended leaves of absence; it does not control or have anything to say concerning where drivers of leased trucks secure their gas and oil or obtain services on their equipment. It does prescribe these matters for drivers on its own payroll, as well as the routes those drivers must follow. Drivers of leased trucks do not have to follow a prescribed route and are free to stop for gas or sojourn overnight wherever they wish. Lessors make the arrangements with leased truck drivers as to compensation, and

some pay more and some less and they use different pay formulas; lessors compete with one another for the better drivers. There has been no collective bargaining contract between Deaton and any Union for a number of years. The driver of a Company owned truck, that is, who is on Deaton's payroll, must get the Company's permission to be excused from work; Deaton has nothing to do with excusing the driver of a leased truck, and such a driver would have to take the matter up with the lessor, the man who was paying him. Deaton has never paid any form of compensation to an injured driver of a leased truck. Deaton does not pay or deduct Social Security taxes for owner-operators and has an Internal Revenue Service ruling that they are independent contractors. Deaton does not maintain a pool of qualified drivers from which multiple truck owners can select drivers. It does not require leased vehicles to be parked on its property when not in use. Truck owners who lease to Deaton also lease trucks to other carriers. They will swap drivers from one carrier to another and Deaton has nothing to say about this. Deaton does not allow its own Company drivers to take trucks home but it is quite usual that owner-operators take their trucks home. Company drivers are not allowed to swap loads around, but it is a common practice that drivers of leased trucks swap loads around, particularly on week ends, so that they can get a load consigned in the direction of their homes. Drivers terminated by one owner-lessor can go and have gone to work for other owner-lessors without consultation with or approval by Deaton. The lease owners have substantial capital investment, about $20,000 a truck. Some are profitable, others have gone bankrupt. Their opportunity for profit or loss depends on their initiative and ability to operate their trucks efficiently and economically. The expenses are largely borne by them, not Deaton (fuel, oil, tires, repairs, wages of other drivers and helpers, taxes, etc). The more successful owner-drivers become multiple owners and may own, as one of Deaton's lessors does, as many as 43 trucks, representing an investment of about $750,-000. Such multiple owners have complete autonomy in estab-

lishing wages and working conditions of their drivers. Some lessors own other businesses; some are widows of former drivers, who own several trucks and hire drivers for them; some have their own maintenance shops to work on their trucks.

The NLRB concluded, Chairman Miller dissenting, that the drivers of leased trucks were Deaton's employees. The Court below held that it did not matter if in other truly indistinguishable cases the NLRB has reached the opposite result. In enforcing the Board's order, the Court reasoned that its function is limited to checking the record for minimal requirement of substantial evidence and that equal protection of the laws was none of its affair.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decision of This Court in Weinberger v. Wiesenfeld, — U.S. —, 43 U.S.L.W. 4393 (March 19, 1975).

This Court held in *Weinberger v. Wiesenfeld*, — U.S. —, 43 U.S.L.W. 4393 (March 19, 1975) that the federal government is prohibited from denying the equal protection of the laws, under the Due Process Clause of the Fifth Amendment of the U.S. Constitution, just as the states are forbidden to deny equal protection, by the terms of the Fourteenth.

> "'[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process."' Schneider v. Rusk, 377 U.S. 163, 168 (1964); see also Bolling v. Sharpe, 347 U.S. 497, 499 (1954). This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment. See, *e.g.*, Schlesinger v. Ballard, — U.S. — (1975); Jimenez v. Weinberger, 417 U.S. 628, 637 (1974); Frontiero v. Richardson, 441 U.S. 677 (1973)."

Any previous doubts as to whether the federal government is obliged to dispense equal-handed justice on the same basis as the states are bound to do under the equal protection clause have now been put to rest.

Nevertheless, the Court of Appeals for the Fifth Circuit has held in this case that the scope of its judicial review of a decision of the National Labor Relations Board does not extend to the question whether the Board is affording equal protection of the laws. In so holding it has ordered enforcement of a Board order which violates the Fifth Amendment,

and says it is "not its province" to consider such argument. Conceding that Board cases reaching the opposite result are truly indistinguishable, it holds this to be proper (502 F. 2d 1221 at 1228):

> "Deaton asks us to remand the case for rehearing by the entire Board on the ground that the 1971 decision is out of harmony with subsequent Board cases. Even if subsequent cases reaching the opposite result are truly indistinguishable, it is not our province to insure an abstract and academic consistency in Board decisions. The personnel and philosophies of administrative bodies are subject to constant change. Especially in an area as fraught with technical distinctions and as dependent on fact findings as the employee-independent contractor dichotomy, we should decline to interfere with a Board decision reached through orderly processes under proper legal standards and supported by substantial evidence. To intervene at this point would work against the essential policy of the Act. . . . ."

In other words, "policy" and personal philosophy of the men who make the decision must prevail over equal application of the law to indistinguishable facts. This is a long way from government of laws and not of men. I am subject to one law, but my identically situated competitor is subject to a different and more favorable law because his judge had a different philosophy.

For a number of years the decisions of the NLRB on whether drivers of trucks leased to certificated motor carriers are employees or independent contractors, have been in total and irreconcilable conflict. Lest the Court think us guilty of partisan hyperbole, we respectfully point out that the most biting denunciation of the NLRB's arbitrariness and total inconsistency in this area has come not from management, but from the national special labor counsel for the International

Brotherhood of Teamsters, the distinguished Milwaukee union lawyer, Gerry M. Miller, writing in "The Uses of the Past at the Miller Board," Southwestern Legal Foundation, Labor Law Developments 1974, 163, 164, 167, 170-172, 187:

> Board doctrine on independent contractors has traditionally been phrased in terms of the so-called common-law right to control test of agency: . . . .
>
> Under the Miller Board, this legal rhetoric has not changed, and no prior decisions have been expressly overruled. But one must add that, notwithstanding these facts, the specific content and direction of this law has changed dramatically, with the caveat that *it now depends on the composition of the Board panel that rules on a particular case.* . . .
>
> Despite some effort by Board decisions-drafters to smooth over the sharp edges of this division of opinion, the result has been, so far, seemingly *to make the outcome of the case predictable, depending upon the composition of the panel that decides it.* If the panel includes Members Fanning and Jenkins, employee status will be found, if it included Members Kennedy and Penello, it will not; when Chairman Miller's vote is decisive, he will opt against employee status: regardless of result, he may write a separate opinion emphasizing the factual detail he thought determinative. This division of opinion recently intensified when on January 18, 1974, the Board split three-to-two in ruling that 500 drivers in a computerized nine-state steel hauling operation with twenty-three terminals were independent contractors [George Transfer & Rigging Co., Inc., 208 NLRB No. 25, 85 LRRM 1097]. . . .
>
> So it appears that stability of legal doctrine in this vital area is solely on the abstract rhetorical surface. Beneath, concrete legal doctrines have been tacitly over-

ruled, important holdings in past cases reversed sub silentio, *the identity of the panel that decides the case* together with the manner in which the facts are characterized and summarized, are seemingly the all-important variables. As a technical matter, *the current law on this subject is clearly deficient* as a meaningful guide for parties, practitioners, or even regional decision-writers, *since the opinions cannot be harmonized* and *many read like laundry lists of factors pro and con employee status with no illumination as to the weight to be ascribed to each in the final balancing process.* . . .

> The topics just discussed were not selected because they present a representative statistical sample of the Board's case load since 1970, but, instead, because they appear to be representative fields, so to speak, *on the "cutting edge" of the developing law in which strong union interests are pitted against equally strong employer concerns.* [Emphasis added.]

Certainly this union labor law expert does not regard this inconsistency in Board decisions as *abstract or academic;* on the contrary, he uses the same terminology as the opinion of the Fifth Circuit did, but for the opposite purpose, to describe the superficial agreement of Board Members on governing legal principles as "abstract" while the true inconsistency in result is nothing if not one of concrete facts and actual cases, lying indeed in a "vital area" on the "cutting edge" of sharply conflicting interests of management and labor.

So much to dispel the notion that we are dealing with an abstraction or an academic quibble. We disagree completely with this union writer's view of what the law is, being of the opinion that *U. S. v. Silk*, 331 U.S. 704 (1947), is still the authoritative statement of the law, but certainly he is right in his view that the matter is of the utmost concrete and prac-

tical importance and that the Board decisions are in intolerable and irreconcilable conflict.

But the Fifth Circuit says, that is too bad, that is no concern of ours; we will let people be treated differently on indistinguishable facts so long as a given panel majority makes a list of "substantial evidence" to support its conclusion even though exactly the same total of evidentiary facts are present in another case, from which another panel majority selects a different list and reaches from them the opposite conclusion.

We believe the Constitution does not permit such inequality of application of the law by an administrative agency and that the Fifth Circuit abdicated its judicial function when it refused to consider the denial of equal protection which is so evident in the Board decisions.

A review of NLRB cases for the past several years fully confirms the state of irreconcilable conflict in the NLRB decisions and the fact that the result could be predicted on the basis of the composition of the panel, but on no rational basis.

In *Fleet Transport Co.*, 196 NLRB No. 61, 80 LRRM 1047 (1972), the NLRB, by a unanimous panel consisting of Chairman Miller and Members Kennedy and Penello, found that a carrier which exercised the control required by I.C.C./D.O.T. regulations was not the employer of leased truck drivers. The facts of that case are indistinguishable from the present one. As for any claim of "additional controls," that is, additional to I.C.C./D.O.T. regulations, the Board said in *Fleet Transport*:

> In our view, the kind of termination clause used in the lease herein, which gives the Employer an option to terminate by giving notice at specified intervals, with automatic renewal of the lease if the option is not exercised, is entirely consistent with independent contrac-

> tor status. Likewise, the fact that the Employer unilaterally determined the rates of commission paid to owner-operators and the terms of the lease may show that the Employer's bargaining power is vastly superior to any owner-operators, but such inequality of bargaining power is not peculiar to an employer-employee relationship.

In the present case also, nothing has been shown that is "peculiar to the employer-employee relationship."

Conley Motor Express, 197 NLRB No. 57, 80 LRRM 1399 (1972), was a unanimous decision by the same panel which decided *Fleet Transport* (Miller, Kennedy and Penello), that owner-drivers were independent contractors in spite of the facts that the carrier made liberal cash advances and interest-free loans to owner operators, and financed their equipment, in addition to enforcing I.C.C./D.O.T. regulations.

But just as consistently as Chairman Miller and members Penello and Kennedy have found independent contractor status to exist on facts indistinguishable from those of the present case, the Board members who constituted the majority of the panel (Fanning, Brown and Jenkins) to whose lot it fell to decide the instant case, have just as consistently in recent years found an employment relationship on comparable facts. *Pony Trucking, Inc.*, 198 NLRB No. 59, 81 LRRM 1249 (1972) (Fanning and Jenkins; Kennedy dissenting) enforced *NLRB v. Pony Trucking, Inc.*, 486 F. 2d 1039 (6th Cir., 1973); *Tryon Trucking, Inc.*, 192 NLRB No. 123, 78 LRRM 1132 (1971) (Fanning and Brown; Miller dissenting). About the only reliable guide, then to predict whether the Board will hold owner-drivers of leased trucks, over whom the carrier exercises no significant control additional to I.C.C./D.O.T. regulations, to be employers or independent contractors, is what members of the Board sit on the panel which decided the case.

As Chairman Miller pointed out, in specially concurring on distinguishable facts in *Aetna Freight Lines, Inc.*, 194 NLRB No. 120, 79 LRRM 1042 (1971):

> In my view, my colleagues are sometimes too ready to find employee status in cases involving this industry. There has been a trend toward finding employee status in nearly every case, and to virtually eliminate by a sort of decisional fiat, any possibility of independent contracting in the trucking field.

More recently, the Board decisions continue to be determined on no discernible basis other than the makeup of the panel, *Portage Transfer Co.*, 204 NLRB No. 117, 83 LRRM 1398, 1400 (1973) (independent contractors; Miller and Penello; Fanning in dissent); *Boxwood, Inc.*, 209 NLRB No. 8, 85 LRRM 1278 (independent contractors; Miller and Kennedy; Fanning in dissent; *Local 814, Teamsters (Santini Bros., Inc.)*, 208 NLRB No. 22, 85 LRRM 1518 (1974) (independent contractors; Miller, Kennedy and Penello); *George Transfer & Rigging Co.*, 208 NLRB No. 25, 85 LRRM 1097 (1974) (independent contractors; en banc; Miller, Kennedy and Penello; Fanning and Jenkins in dissent); *Pilot Freight Carriers, Inc.*, 208 NLRB No. 138, 85 LRRM 1179 (1974) (employees; Miller, Fanning, Jenkins); *Yellow Cab Co.*, 208 NLRB No. 121, 85 LRRM 1273 (1973) (independent contractors; en banc; Miller, Kennedy and Penello; Fanning and Jenkins in dissent); *Kreitz Motor Express, Inc.*, 210 NLRB No. 11, 86 LRRM 1217 (1974) (independent contractors; Kennedy and Penello; Jenkins in dissent); *Daily Express, Inc.*, 211 NLRB No. 19, 86 LRRM 1355 (1974) (independent contractors; Kennedy and Penello; Fanning in dissent); *Columbus Green Cabs*, 214 NLRB No. 93, 87 LRRM 1375 (1974) (independent contractors; Kennedy and Penello, Fanning in dissent); *Fraley & Schilling, Inc.*, 211 NLRB No. 49, 87 LRRM 1378 (1974) (independent contractors; Jenkins, Kennedy and Penello); *Eck Miller Trans-*

portation Corp., 211 NLRB No. 12, 87 LRRM 1409 (1974) (independent contractors; Jenkins, Kennedy and Penello); *Ace Doran Hauling & Rigging Co.*, 214 NLRB No. 84, 87 LRRM 1525 (1974) (independent contractors; en banc; Miller, Kennedy and Penello; Fanning and Jenkins in dissent).

The latest decision, *Ace Doran Hauling & Rigging Co., supra*, decided November 8, 1974, is perhaps as egregious as any. In an earlier case involving the same ICC-regulated carrier, *Ace Doran Hauling & Rigging Co.*, 191 NLRB 428 (1971), the owner-operators were held to be employees by a panel majority of former Member Brown and Member Jenkins; Chairman Miller dissenting. The carrier was ordered to cease and desist from refusing to bargain in good faith, precisely as in this instant case. The Sixth Circuit then enforced the Board's order, 462 F. 2d 190 (1972). The carrier was therefore in exactly the posture Deaton is in now. Subsequently, the full five-member Board made an about face and a majority, consisting of Miller, Kennedy and Penello; Fanning and Jenkins dissenting, held the owner-operators were independent contractors, the majority's principal explanation being—

> In making our analysis we have in the instant case the advantage of a full and complete record covering the Employer's total operation, whereas in the [earlier] case . . . we had exercised our discretion not to grant a full review of the Regional Director's decision therein, which in any event related only to a portion of its total operations.

The majority did not find *any* changes had been made in the carrier's methods of operation. Only that it had a more complete record the second time around. The two dissenters said "the employer *may* now allow more trip leasing" than at the time of the earlier case, but also pointed out that the carrier "may" now be violating ICC regulations by its trip leasing practices. The majority said it expressed no opinion as to whether the carrier was now violating ICC or DOT regulations, it not being the Board's responsibility to police those regulations.

Mind you, this was the same carrier with no finding of any change in the method of operations. And the only arguable change would *in fact* constitute a violation of ICC regulations, 49 CFR §1057.4. For practical purposes, the Board's decisions are useless as a guide to conduct, as a basis of advice or prediction of outcome. Meaningful judicial review is impossible given the approach of the Fifth Circuit, because the decision is actually unprincipled. The partisans of Unions and management agree on one thing: that the Board's decisions on this question are in a state of irreconcilable inconsistency and are arbitrary. They deny the equal protection of the laws to Unions, carriers, and owner-operators.

Yet the Fifth Circuit says its job is done if it checks out the Board's list of indicia in a particular case, no matter how inconsistently the Board is acting in other cases where the *same* indicia, *pro and con,* are also present. We believe the Fifth Circuit abdicated its judicial responsibility and denied Deaton the equal protection of the laws, when it said the inconsistency and lack of rationally explicable principle of Board decisions are none of its affair. It must consider the sufficiency of evidence on the record considered as a whole; it must view other Board decisions to determine if they are arbitrary and capricious; it must see that the Board is not denying equal protection of the laws. The Fifth Circuit's notion of the policy of the Labor Management Relations Act cannot overcome the Constitutional requirement of equal protection. Our competitors operating the same way we do are allowed to deal with their lessors as independent contractors; they do not have to bargain collectively under the Labor Management Relations Act with their owner-drivers, and in fact have the protection of the antitrust laws against concerted activities by those persons which the Fifth Circuit holds our owner-drivers have the right to engage in. Neither the unions, the owner-drivers, nor the carriers are receiving the equal protection of the laws, but all are being dealt with arbitrarily. Yet the Court of Appeals for the Fifth Circuit

says that is outside of its province. The writ of certiorari should issue to correct this unconscionable and unconstitutional state of affairs.

2. **The Decision Below Conflicts With United States v. Silk (Harrison, Collector of Internal Revenue v. Greyvan Lines, Inc.), 331 U.S. 704 (1947).**

Please see the dissenting opinion of NLRB Chairman Miller in *Deaton, Inc.*, 187 NLRB 780, 782-4 (1973), Appendix, infra, pp. A-91-A-96.

We submit that the *Silk* case is still the law and is controlling on the facts of this case. This Court recognizes it is possible to operate a motor carrier consistently with DOT-ICC regulations, with independent contractor drivers. Some members of the NLRB recognize that possibility and others in effect do not. Those members have, "by a sort of administrative fiat," sought to overrule *U.S. v. Silk* while paying it theoretical lip service.

3. **The Court of Appeals for the Fifth Circuit Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.**

The Court below expressly disclaimed any responsibility in judicially reviewing an NLRB determination that drivers are employees or independent contractors, beyond a canvass of the factors relied on by the NLRB in making that particular determination; when in fact the same list of factors can be drawn up in every real-life case to support that determination or another list to support the opposite determination. By refusing to consider, indeed, by even disclaiming the power to consider the gross inconsistencies in the two lines of NLRB decisions on this question, the Court below has abdicated its judicial responsibility, its oath to uphold the Constitution, and its duty to re-

view and set aside arbitrary administrative action. This Court's powers of supervision are therefore invoked, to insure that judicial review of NLRB decisions shall not become a meaningless ceremony in which the Constitution falls victim to some undefined policy.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted

ANDREW J. THOMAS
C. V. STELZENMULLER
1600 Bank for Savings Building
Birmingham, Alabama 35203
Counsel for Petitioner

April 14, 1975

Certificate of Service

I hereby certify that on this 14th day of April, 1975, three copies of the Petition for Writ of Certiorari were mailed, properly addressed and postage prepaid, to the Honorable Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, Washington, D.C. 20570, Counsel for the Respondent. I further verify that all parties required to be served have been served.

Andrew J. Thomas
1600 Bank for Savings Building
Birmingham, Alabama 35203
Counsel for Petitioner

EXCERPTS FROM MOTOR CARRIER SAFETY REGULATIONS, 49 CFR PARTS 390-397, 1057-1058

Part 390—Motor Carrier Safety Regulations: General.

* * * * * * *

§ 390.11 Driver.

The term "driver" means any person who drives any motor vehicle.

* * * * * * *

§ 390.32 Motor carrier to require observance of driver regulations.

Whenever in Parts 390-397 of this sub-chapter a duty is prescribed for a driver or a prohibition is imposed upon him, it shall be the duty of the motor carrier to require observance of such prescription or prohibition; and, if the motor carrier is himself a driver, he shall likewise be bound thereby.

* * * * * * *

Part 391—Qualifications of Drivers.

* * * * * * *

Subpart A—General

§ 391.1 Scope of the rules in this part; additional qualifications; duties of carrier-drivers.

(a) The rules in this part establish minimum qualifications for persons who drive motor vehicles as, for, or on behalf of motor carriers. The rules in this part also establish minimum duties of motor carriers with respect to the qualifications of their drivers.

(b) The rules in this part, and in other parts of this subchapter, do not prevent a motor carrier from imposing more stringent or

additional qualifications, requirements, examinations, or certificates than are imposed by those rules.

(c) A motor carrier who employs himself as a driver must comply with both the rules in this part that apply to motor carriers and the rules in this part that apply to drivers.

§ 391.2 General exemptions.

(a) *Intracity operations.* The rules in this part do not apply to a driver wholly engaged in exempt intracity operations as defined in § 390.16 of this chapter.

(b) *Passenger car operations.* The rules in this part do not apply to a driver who drives only a motor vehicle that—

(1) Is a passenger-carrying vehicle built on a passenger car chassis with a seating capacity of 10 or less persons, including the driver; and

(2) Is not transporting passengers for hire; and

(3) Is not transporting hazardous materials of a type or quantity that requires the vehicle to be marked or placarded in accordance with § 177.823 of this title.

(c) *Certain farm vehicle drivers.* The rules in this part do not apply to a farm vehicle driver except a farm vehicle driver who drives an articulated (combination) motor vehicle that has a gross weight, including its load, of more than 10,000 pounds. [For limited exemptions for farm vehicle drivers of heavier articulated vehicles see § 391.67.]

(d) *Farm custom operations.* The rules in this part do not apply to a driver who drives a motor vehicle controlled and operated by a person engaged in custom-harvesting operations, if the vehicle is used to—

(1) Transport farm machinery, supplies, or both, to or from a farm for custom-harvesting operations on a farm; or

(2) Transport custom-harvested crops to storage or market.

(e) *Apiarian industries.* The rules in this part do not apply to a driver who is operating a motor vehicle controlled and operated by a beekeeper engaged in the seasonal transportation of bees.

[36 F.R. 24219, Dec. 22, 1971]

§ 391.3—Definitions.

(a) The term "motor carrier" includes a motor carrier and the agents, officers, representatives, and employees of a motor carrier who are responsible for the hiring, supervision, training, assignment, or dispatching of drivers.

(b) The term "Director" means the Director of the Bureau of Motor Carrier Safety.

(c) A motor carrier "employs" a person as a driver within the meaning of this part whenever it requires or permits that person to drive a motor vehicle (whether or not the vehicle is owned by the motor carrier) in furtherance of the business of the motor carrier.

(d) The term "farm vehicle driver" means a person who drives only a motor vehicle that is—

(1) Controlled and operated by a farmer; and

(2) Being used to transport either—

(i) Agricultural products; or

(ii) Farm machinery, farm supplies, or both, to or from a farm; and

(3) Not being used in the operations of a common or contract carrier; and

(4) Not carrying hazardous materials of a type or quantity that requires the vehicle to be marked or placarded in accordance with § 177.823 of this title; and

(5) Either—

(i) A vehicle having a gross weight, including its load, of 10,000 pounds or less; or

(ii) A vehicle being used within 150 miles of the farmer's farm.

[35 F.R. 6460, Apr. 22, 1970, as amended at 36 F.R. 24219, Dec. 22, 1971]

§ 391.5 Familiarity with rules.

Each motor carrier and each driver shall know, and be familiar with, the rules in this part.

§ 391.7 Aiding or abetting violations.

No person shall aid, abet, encourage, or require a motor carrier or a driver to violate the rules in this part.

Subpart B—Qualification and Disqualification of Drivers

§ 391.11 Qualifications of drivers.

(a) A person shall not drive a motor vehicle unless he is qualified to drive a motor vehicle. Except as provided in § 391.63, a motor carrier shall not require or permit a person to drive a motor vehicle unless that person is qualified to drive a motor vehicle.

(b) Except as provided in subpart G of this part, a person is qualified to drive a motor vehicle if he—

(1) Is at least 21 years old;

(2) Can read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records;

(3) Can, by reason of experience, training, or both, safely operate the type of motor vehicle he drives;

(4) Can, by reason of experience, training or both, determine whether the cargo he transports (including baggage in a passenger-carrying motor vehicle) has been properly located, distributed, and secured in or on the motor vehicle he drives;

(5) Is familiar with methods and procedures for securing cargo in or on the motor vehicle he drives.

(6) Is physically qualified to drive a motor vehicle in accordance with § 391.41;

(7) Has been issued a currently-valid motor vehicle operator's license or permit;

(8) Has prepared and furnished the motor carrier that employs him with the list of violations or the certificate as required by § 391.27;

(9) Is not disqualified to drive a motor vehicle under the rules in § 391.15;

(10) Has successfully completed a driver's road test and has been issued a certificate of driver's road test in accordance with § 391.31, or has presented an operator's license or a certificate of road test which the motor carrier that employs him has accepted as equivalent to a road test in accordance with § 391.33;

(11) Has taken a written examination and has been issued a certificate of written examination in accordance with § 391.35, or has presented a certificate of written examination which the motor carrier that employs him has accepted as equivalent to a written examination in accordance with § 391.37; and

(12) Has completed and furnished the motor carrier that employs him with an application for employment in accordance with § 391.21.

[35 F.R. 6460, Apr. 22, 1970, amended at 35 F.R. 17420, Nov. 13, 1970; 35 F.R. 19181, Dec. 18, 1970; 36 F.R. 222, Jan. 7, 1971, 36 F.R. 24220, Dec. 22, 1971]

§ 391.15 Disqualification of drivers.

(a) A driver who is disqualified shall not drive a motor vehicle. A motor carrier shall not require or permit a driver who is disqualified to drive a motor vehicle.

(b) A driver is disqualified—

(1) For 3 years after he has been convicted of, or forfeited bond or collateral upon, a charge of committing any of the following criminal offenses:

(i) A felony committed after December 31, 1970 and involving the use of a vehicle by that driver; or

(ii) A crime committed after December 31, 1970 and involving the manufacturing, knowing transportation, knowing possession, sale, or habitual use of amphetamines, a narcotic drug, a formulation of an amphetamine, or a derivative of a narcotic drug; or

(iii) Operating a vehicle after December 31, 1970 and while under the influence of alcohol, an amphetamine, a narcotic drug,

a formulation of an amphetamine, or a derivative of a narcotic drug; or

(iv) Leaving the scene of an accident after December 31, 1970, if the accident resulted in personal injury or death; or

(2) For the duration of the driver's loss of his privilege to operate a commercial vehicle on public highways, either temporarily or permanently, by reason of the suspension, revocation, withdrawal, or denial of any operator's license, permit, or privilege until that operator's license, permit, or privilege is restored by the authority that suspended, revoked, withdrew, or denied it.

[35 F.R. 6460, Apr. 22, 1970, as amended at 36 F.R. 5705, Mar. 26, 1971]

Subpart C—Background and Character

§ 391.21 Application for employment.

(a) Except as provided in Subpart G of this part, a person shall not drive a motor vehicle unless he has completed and furnished the motor carrier that employs him with an application for employment that meets the requirements of paragraph (b) of this section.

(b) The application for employment shall be made on a form furnished by the motor carrier. Each application form must be completed by the applicant, must be signed by him, and must contain the following information:

(1) The name and address of the employing motor carrier;

(2) The applicant's name, address, date of birth, and social security number;

(3) The addresses at which the applicant has resided during the 3 years preceding the date on which the application is submitted;

(4) The date on which the application is submitted;

(5) The issuing State, number, and expiration date of each unexpired motor vehicle operator's license or permit that has been issued to the applicant;

(6) The nature and extent of the applicant's experience in the operation of motor vehicles, including the type of equipment (such as buses, trucks, truck tractors, semitrailers, full trailers, and pole trailers) which he has operated;

(7) A list of all motor vehicle accidents in which the applicant was involved during the 3 years preceding the date the application is submitted, specifying the date and nature of each accident and any fatalities or personal injuries it caused;

(8) A list of all violations of motor vehicle laws or ordinances (other than violations involving only parking) of which the applicant was convicted or forfeited bond or collateral during the 3 years preceding the date the application is submitted;

(9) A statement setting forth in detail the facts and circumstances of any denial, revocation, or suspension of any license, permit, or privilege to operate a motor vehicle that has been issued to the applicant, or a statement that no such denial, revocation, or suspension has occurred;

(10) A list of the names and addresses of the applicant's employers during the 3 years preceding the date the application is submitted, together with the dates he was employed by, and his reason for leaving the employ of, each employer; and

(11) The following certification and signature line, which must appear at the end of the application form and be signed by the applicant:

This certifies that this application was completed by me, and that all entries on it and information in it are true and complete to the best of my knowledge.

....

(Date) (Applicant's signature)

(c) A motor carrier may require an applicant to provide information in addition to the information required by paragraph (b) of this section on the application form.

(d) Before an application is submitted, the motor carrier shall inform the applicant that the information he provides in accordance with paragraph (b) (10) of this section may be used, and the applicant's prior employers may be contacted, for the purpose of investigating the applicant's background as required by § 391.23.

[35 F.R. 6460, Apr. 22, 1970, as amended at 35 F.R. 17420, Nov. 13, 1970]

§ 391.23 Investigation and inquiries.

(a) Except as provided in Subpart G of this part, each motor carrier shall make the following investigations and inquiries with respect to each driver it employs, other than a person who has been a regularly employed driver of the motor carrier for a continuous period which began before January 1, 1971:

(1) An inquiry into the driver's driving record during the preceding 3 years to the appropriate agency of every State in which the driver held a motor vehicle operator's license or permit during those 3 years; and

(2) An investigation of the driver's employment record during the preceding 3 years.

(b) The inquiry to State agencies required by paragraph (a) (1) of this section must be made within 30 days of the date the driver's employment begins and shall be made in the form and manner those agencies prescribe. A copy of the response by each State agency, showing the driver's driving record or certifying that no driving record exists for that driver, shall be retained in the carrier's files as part of the driver's qualification file.

(c) The investigation of the driver's employment record required by paragraph (a) (2) of this section must be made within 30 days of the date his employment begins. The investigation may consist of personal interviews, telephone interviews, letters, or any other method of obtaining information that the carrier deems appropriate. Each motor carrier must make a written record with respect to each past employer who was contacted. The record must include the past employer's name and address, the date he was contacted, and his comments with respect to the driver. The record shall be retained in the motor carrier's files as part of the driver's qualification file.

[35 F.R. 6460, Apr. 22, 1970, as amended at 35 F.R. 17420, Nov. 13, 1970]

§ 391.25 Annual review of driving record

Except as provided in Subpart G of this part, each motor carrier shall, at least once every 12 months, review the driving record of each driver it employs to determine whether that driver meets minimum requirements for safe driving or is disqualified to drive a motor vehicle pursuant to § 391.15. In reviewing a driving record, the motor carrier must consider any evidence that the driver has violated applicable provisions of the Motor Carrier Safety Regulations and the Hazardous Materials Regulations. The motor carrier must also consider the driver's accident record and any evidence that the driver has violated laws govern-

ing the operation of motor vehicles, and must give great weight to violations, such as speeding, reckless driving, and operating while under the influence of alcohol or drugs, that indicate that the driver has exhibited a disregard for the safety of the public.

A note, setting forth the date upon which the review was performed and the name of the person who reviewed the driving record, shall be included in the driver's qualification file.

[35 F.R. 6460, Apr. 22, 1970, as amended at 35 F.R. 17420, Nov. 13, 1970]

§ 391.27 Record of violations.

(a) Except as provided in Subpart G of this part, each motor carrier shall, at least once every 12 months, require each driver it employs to prepare and furnish it with a list of all violations of motor vehicle traffic laws and ordinances (other than violations involving only parking) of which the driver has been convicted or on account of which he has forfeited bond or collateral during the preceding 12 months.

(b) Each driver shall furnish the list required in accordance with paragraph (a) of this section. If the driver has not been convicted of, or forfeited bond or collateral on account of, any violation which must be listed, he shall so certify.

(c) The form of the driver's list or certification shall be prescribed by the motor carrier. The following form may be used to comply with this section:

Motor Vehicle Driver's Certification

I certify that the following is a true and complete list of traffic violations (other than parking violations) for which I have been convicted or forfeited bond or collateral during the past 12 months.

Date of conviction	Offense	Location	Type of operated vehicle
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....

If no violations are listed above, I certify that I have not been convicted or forfeited bond or collateral on account of any violation required to be listed during the past 12 months.

.....	.....
(Date of certification)	(Driver's signature)
.....	.....
(Motor carrier's name)	(Motor carrier's address)
.....	.....
(Reviewed by: Signature)	(Title)

(d) The motor carrier shall retain the list or certificate required by this section, or a copy of it, in its files as part of the driver's qualification file.

[35 F.R. 6460, Apr. 22, 1970, as amended at 35 F.R. 17420, Nov. 13, 1970]

Subpart D—Examinations and Tests

§ 391.31 Road test.

(a) Except as provided in §§ 391.33, 391.61, and 391.67, a person shall not drive a motor vehicle unless he has first successfully completed a road test and has been issued a certificate of driver's road test in accordance with this section.

(b) The road test shall be given by the motor carrier or a person designated by it. However, a driver who is a motor carrier must be given the test by a person other than himself. The test shall be given by a person who is competent to evaluate and determine whether the person who takes the test has demonstrated that he is capable of operating the vehicle, and associated equipment, that the motor carrier intends to assign him.

(c) The road test must be of sufficient duration to enable the person who gives it to evaluate the skill of the person who takes it at handling the motor vehicle, and associated equipment, that the motor carriers intends to assign to him. As a minimum, the person who takes the test must be tested, while operating the type of motor vehicle the motor carrier intends to assign him, on his skill at performing each of the following operations:

(1) The pretrip inspection required by § 392.7 of this subchapter:

(2) Coupling and uncoupling of combination units, if the equipment he may drive includes combination units;

(3) Placing the vehicle in operation;

(4) Use of the vehicle's controls and emergency equipment;

(5) Operating the vehicle in traffic and while passing other vehicles;

(6) Turning the vehicle;

(7) Braking, and slowing the vehicle by means other than braking; and

(8) Backing and parking the vehicle.

(d) The motor carrier shall provide a road test form on which the person who gives the test shall rate the performance of the person who takes it at each operation or activity which is a part

of the test. After he completes the form, the person who gave the test shall sign it.

(e) If the road test is successfully completed, the person who gave it shall complete a certificate of driver's road test in substantially the form prescribed in paragraph (f) of this section.

(f) The form for the certificate of driver's road test is substantially as follows:

Certification of Road Test

Driver's name .....

Social Security No. .....

Operator's or Chauffeur's License No. .....

State .....

Type of power unit .....

Type of trailer(s) .....

If passenger carrier, type of bus .....

This is to certify that the above-named driver was given a road test under my supervision on .....19..... consisting of approximately ..... miles of driving.

It is my considered opinion that this driver possesses sufficient driving skill to operate safely the type of commercial motor vehicle listed above.

....

(Signature of examiner) (Title)

.....

(Organization and address of examiner)

(g) A copy of the certificate required by paragraph (e) of this section shall be given to the person who was examined. The

motor carrier shall retain in the driver qualification file of the person who was examined—

(1) The original of the signed road test form required by paragraph (d) of this section; and

(2) The original, or a copy of, the certificate required by paragraph (e) of this section.

[35 F.R. 6460, Apr. 22, 1970, as amended at 36 F.R. 223, Jan. 7, 1971]

§ 391.33 Equivalent of road test.

(a) In place of, and as equivalent to, the road test required by § 391.31, a person who seeks to drive a motor vehicle may present, and a motor carrier may accept—

(1) A valid operator's license which has been issued to him by a State that licenses drivers to operate specific categories of motor vehicles and which, under the laws of that State, licenses him after successful completion of a road test in a motor vehicle of the type the motor carrier intends to assign to him; or

(2) A copy of a valid certificate of driver's road test issued to him pursuant to § 391.31 within the preceding 3 years.

(b) If a driver presents, and a motor carrier accepts, a license or certificate as equivalent to the road test, the motor carrier shall retain a legible copy of the license or certificate in its files as part of the driver's qualification file.

(c) A motor carrier may require any person who presents a license or certificate as equivalent to the road test to take a road test or any other test of his driving skill as a condition to his employment as a driver.

§ 391.35 Written examination.

(a) Except as provided in §§ 391.37, 391.61, and 391.67, a person shall not drive a motor vehicle unless he has first taken a written examination and has been issued a certificate of written examination in accordance with this section.

(b) The objective of the written examination is to instruct prospective drivers in the rules and regulations established by the Federal Highway Administration pertaining to commercial vehicle safety. It is an instructional tool only, and a person's qualifications to drive a motor vehicle under the rules in this part are not affected by his performance on the examination. Motor carriers subject to title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1-2000e-15), Executive Order 11246, or both, are cautioned that neither the written examination requirements in this section nor any other rules in this part authorizes a motor carrier to violate the provisions of the Act, the Executive Order, or regulations issued under them with respect to equal opportunity in employment.

(c) The written examination shall be given by the motor carrier or a person designated by it, on a form prescribed by the motor carrier.

(d) Prior to, and during, the examination, the person who takes it shall be permitted to examine and consult a copy of the Motor Carrier Safety Regulations (Subchapter B of this title) in addition to any other material explaining the provisions of those regulations that the motor carrier may provide. There is no time limit for completing the examination, and persons taking it shall be so advised in advance.

(e) The examination shall consist of at least 30 questions, covering the examinee's knowledge of the Motor Carrier Safety Regulations and, in the case of a person who may drive a vehicle transporting hazardous materials, the Hazardous Materials Regulations. The questions shall be taken from the list of ques-

tions published by the Bureau of Motor Carrier Safety in Appendix C to this subchapter.[1]

(f) After the examinee completes the examination, the person who administered it shall advise him of the correct answers to any questions he failed to answer correctly. The motor carrier may also provide the examinee with such additional instruction in the pertinent regulations as appears to be warranted on the basis of his performance on the examination.

(g) The motor carrier, or the person who administered the examination on the motor carrier's behalf, shall provide every person who completes the examination with a certificate in substantially the following form:

Certificate of Written Examination

This is to certify that the person whose signature appears below has completed the written examination under my supervision in accordance with the provisions of § 391.35 of the Motor Carrier Safety Regulations.

.....

(Signature of person taking examination)

.....

(Date of examination)

.....

(Location of examination)

.....

(Signature of examiner)

---

[1] Copies of the list of questions (and answers to the questions) may be obtained by writing to the Director, Bureau of Motor Carrier Safety, Washington, D.C. 20591, or to any Regional Federal Highway Administrator at the address given in § 390.40 of this subchapter.

. . . . . .

(Title)

. . . . . .

(Organization and address of examiner)

(h) A copy of the certificate required by paragraph (g) of this section shall be given to the person who was examined. The motor carrier shall retain, in the driver qualification file of the person who was examined—

(1) The original, or a copy of, the certificate required by paragraph (g) of this section;

(2) The questions asked on the examination; and

(3) The person's answers to those questions.

[35 F.R. 19182, Dec. 18, 1970, as amended at 36 F.R. 223, Jan. 7, 1971]

§ 391.37 Equivalent of written examination.

(a) In place of, and as equivalent to, the written examination required by § 391.35, a person who seeks to drive a motor vehicle may present, and a motor carrier may accept, a valid certificate of written examination issued pursuant to paragraph (d) of that section within the preceding 3 years.

(b) If a motor carrier accepts a certificate as equivalent to the written examination, it shall retain a legible copy of the certificate in its files as part of the driver's qualification file.

(c) A motor carrier may require any person who presents a certificate as equivalent to the written examination to take the written examination prescribed in § 391.35 or participate in

any other instructional process designed to acquaint him with the provisions of Parts 390-397 of this subchapter.

[35 F.R. 6460, Apr. 22, 1970, as amended at 35 F.R. 17420, Nov. 13, 1970]

Subpart E—Physical Qualifications and Examinations

§ 391.41 Physical qualifications for drivers.

(a) A person shall not drive a motor vehicle unless he is physically qualified to do so and, except as provided in § 391.-67, has on his person the original, or a photographic copy, of a medical examiner's certificate that he is physically qualified to drive a motor vehicle.

(b) A person is physically qualified to drive a motor vehicle if he—

(1) Has no loss of a foot, a leg, a hand, or an arm, or has been granted a waiver pursuant to § 391.49;

(2) Has no impairment of the use of a foot, a leg, a hand, fingers, or an arm, and no other structural defect or limitation, which is likely to interfere with his ability to control and safely drive a motor vehicle, or has been granted a waiver pursuant to § 391.49 upon a determination that the impairment will not interfere with his ability to control and safely drive a motor vehicle.

(3) Has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control;

(4) Has no current clinical diagnosis of myocardial infarction, angina pectoris, coronory insufficiency, thrombosis, or any other cardiovascular disease of a variety known to be accompanied by syncope, dyspnea, collapse, or congestive cardiac failure.

(5) Has no established medical history or clinical diagnosis of a respiratory dysfunction likely to interfere with his ability to control and drive a motor vehicle safely;

(6) Has no current clinical diagnosis of high blood pressure likely to interfere with his ability to operate a motor vehicle safely;

(7) Has no established medical history or clinical diagnosis of rheumatic, arthritic, orthopedic, muscular, neuromuscular, or vascular disease which interferes with his ability to control and operate a motor vehicle safely;

(8) Has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a motor vehicle;

(9) Has no mental, nervous, organic, or functional disease or psychiatric disorder likely to interfere with his ability to drive a motor vehicle safely;

(10) Has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridan in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber;

(11) First perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5—1951.

(12) Does not use an amphetamine, narcotic, or any habit-forming drug; and

(13) Has no current clinical diagnosis of alcoholism.

[35 F.R. 6460, Apr. 22, 1970, as amended at 35 F.R. 17420, Nov. 13, 1970; 36 F.R. 223, Jan. 7, 1971; 36 F.R. 12857, July 8, 1971]

§ 391.43 Medical examination; certificate of physical examination.

(a) Except as provided in paragraph (b) of this section, the medical examination shall be performed by a licensed doctor of medicine or osteopathy.

(b) A licensed optometrist may perform so much of the medical examination as pertains to visual acuity, field of vision, and the ability to recognize colors as specified in subparagraph (10) of § 391.41(b).

(c) The medical examination shall be performed, and its results shall be recorded, substantially in accordance with the following instructions and examination form:

Instructions for Performing and Recording Physical Examinations

[Omitted]

* * * * * * * *

(d) If the medical examiner finds that the person he examined is physically qualified to drive a motor vehicle in accordance with § 391.41(b), he shall complete a certificate in the form prescribed in paragraph (e) of this section and furnish one copy to the person who was examined and one copy to the motor carrier that employs him.

(e) The medical examiner's certificate shall be in accordance with the following form:

MEDICAL EXAMINER'S CERTIFICATE

I certify that I have examined ..... in
(Driver's name (Print))

accordance with the Motor Carrier Safety Regulations (49 CFR 391.41-49) and with knowledge of his duties, I find him qualified under the regulations.

[ ] Qualified only when wearing corrective lenses.

A complete examination form for this person is on file in my office at .....
(Address)

.....
(Date of examination)

.....
(Name of examining doctor (Print))

.....
(Signature of examining doctor)

.....
(Signature of driver)

.....
(Address of driver)

If the driver is qualified only when wearing a hearing aid, the following statement must appear on the medical examiner's certificate: "qualified only when wearing a hearing aid."

[35 F.R. 6460, Apr. 22, 1970, as amended at 35 F.R. 17420, Nov. 13, 1970; 36 F.R. 8452, May 6, 1971; 36 F.R. 12857, July 8, 1971]

§ 391.45 Persons who must be medically examined and certified.

Except as provided in § 391.67, the following persons must be medically examined and certified in accordance with § 391.43 as physically qualified to drive a motor vehicle:

(a) Any person who has not been medically examined and certified as physically qualified to drive a motor vehicle;

(b) Any driver who has not been medically examined and certified as qualified to drive a motor vehicle during the preceding 24 months; and

(c) Any driver whose ability to perform his normal duties has been impaired by a physical or mental injury or disease.

§ 391.45 Persons who must be medically examined and certified.

(a) If, having performed medical examination of a person pursuant to § 391.43, two or more medical examiners disagree as to whether that person is physically qualified to drive a motor vehicle, the Director, on application of that person or a motor carrier, may determine whether that person is physically qualified to drive a motor vehicle.

(b) An application under this section must be accompanied by the physical examination reports of the disagreeing medical examiners. The application must demonstrate to the Director's satisfaction that before he found the person physically qualified to drive, an examiner who did so was fully aware of the person's complete medical history and of the nature of the work the person would perform if he were found physically and otherwise qualified to drive a motor vehicle. As a minimum, the examiner must have been informed of the type, size, and weight of the vehicles the person would drive, the distances he would traverse,

the number of hours he would spend in an on-duty status, and the related duties (such as loading, unloading, climbing onto and descending from vehicles, and making repairs en route (if he would be required to do so)) that the person would perform.

(c) If the Director determines that the person is physically qualified to drive a motor vehicle, a motor carrier may accept the medical examiner's certificate issued to that person pursuant to § 391.43.

[35 F.R. 6460, Apr. 22, 1970, as amended at 35 F.R. 17420, Nov. 13, 1970]

§ 391.49 Waiver of certain physical defects.

(a) A person who is not physically qualified to drive under § 391.41(b) (1) or (2) and who is otherwise qualified to drive a motor vehicle, may drive a motor vehicle, other than a motor vehicle which transports passengers or a motor vehicle which must be placarded or marked in accordance with § 177.823 of this Title 49 (relating to placards or markups upon vehicles which transport hazardous materials), if the Director has granted an application for a waiver with respect to that person.

(b) An application for a waiver must be submitted jointly by the person who seeks a waiver of his physical disqualification (the individual applicant) and by the motor carrier that will employ him if the application is granted. The application must be addressed to the Director, Bureau of Motor Carrier Safety, Washington, D.C. 20591.

(c) An application for a waiver must contain—

(1) A description of the type, size, and special equipment (if any) of the vehicles the individual applicant intends to drive, the general area and type of roads he intends to traverse while driving, the distances he intends to drive, the periods of time

he will be on duty while driving, the nature of the commodities or cargo he intends to transport, the methods he or any other person will use to load and secure those commodities or cargo, and the nature and extent of his experience at operating motor vehicles of the type he intends to drive;

(2) An agreement by both applicants that the motor carrier will promptly file with the Director such reports as he may require, including reports about the driving activities, accidents, arrests, license suspensions, revocations, or withdrawals, and convictions which involve the individual applicant; and

(3) An agreement that, if a waiver is granted, it authorizes the individual applicant to drive in interstate commerce only when employed by the motor carrier that joined in his application.

(d) An application for a waiver must be accompanied with—

(1) At least two reports of medical examinations made pursuant to § 391.43, at least one of which was conducted by a medical examiner selected and compensated by the motor carrier, each of which includes the medical examiner's opinion concerning the individual applicant's ability to operate safely a motor vehicle of the type he intends to drive;

(2) A copy of the certificate of driver's road test that was issued to the individual applicant pursuant to § 391.31;

(3) A copy of the certificate of written examination that was issued to the individual applicant pursuant to § 391.35; and

(4) A copy of the individual applicant's application for employment made pursuant to § 391.21.

(e) An application for a waiver shall be signed by both the individual applicant and the motor carrier. If the motor carrier is a corporation, the application shall be signed by an officer of the corporation. If the motor carrier is a partnership, the

application shall be signed by a partner. If the motor carrier is an individual proprietorship, the application shall be signed by the proprietor.

(f) The Director may deny the application or he may grant it in whole or in part and issue a waiver subject to such terms, conditions, and limitations as he deems consistent with safety and the public interest. A waiver is valid for a period not exceeding 2 years, and it may be renewed upon submission of a new application pursuant to this section.

(g) If the Director grants a waiver, he will notify each applicant by a letter, which sets forth the terms, conditions, and limitations of the waiver. The motor carrier shall retain the letter (or a legible copy of it) in its files as long as the individual applicant is employed by that motor carrier and for 3 years thereafter. The individual applicant shall have the letter (or a legible copy of it) in his possession whenever he drives a motor vehicle or is otherwise on duty.

(h) The Director may suspend a waiver at any time. The Director may revoke a waiver after the persons to whom it was issued are given notice of the proposed revocation and a reasonable opportunity to be heard.

Subpart F—Files and Records

§ 391.51 Driver qualification files.

(a) Each motor carrier shall maintain a driver qualification file for each driver it employs. A driver's qualification file may be combined with his personnel file.

(b) The qualication file for a driver who has been a regularly employed driver of the motor carrier for a continuous period which began before January 1, 1971, must include—

(1) The medical examiner's certificate of his physical qualification to drive a motor vehicle or a legible photographic copy of the certificate;

(2) The Director's letter granting a waiver of a physical disqualification, if a waiver was issued under § 391.49;

(3) The note relating to the annual review of his driving record required by § 391.25.

(4) The list or certificate relating to violations of motor vehicle laws and ordinances required by § 391.27; and

(5) Any other matter which relates to the driver's qualifications or ability to drive a motor vehicle safely.

(c) The qualification file for a regularly employed driver who has not been regularly employed by the motor carrier for a continuous period which began before January 1, 1971, must include—

(1) The documents specified in paragraph (b) of this section;

(2) The driver's application for employment completed in accordance with § 391.21;

(3) The responses of State agencies and past employers to the motor carrier's inquiries concerning the driver's driving record and employment pursuant to § 391.23.

(4) The certificate of driver's road test issued to the driver pursuant to § 391.31 (e), or a copy of the license or certificate which the motor carrier accepted as equivalent to the driver's road test pursuant to § 391.33; and

(5) The questions asked, the answers the driver gave, and the certificate of written examination issued to him pursuant to § 391.35, or a copy of a certificate which the motor carrier accepted as equivalent to a written examination pursuant to § 391.37.

(d) The qualification file for an intermittent, causal, or occasional driver employed under the rules in § 391.63 must include—

(1) The medical examiner's certificate of his physical qualification to drive a motor vehicle or a legible photographic copy of the certificate;

(2) The certificate of a driver's road test issued to the driver pursuant to § 391.31(e), or a copy of the license or certificate which the motor carrier accepted as equivalent to the driver's road test pursuant to § 931.31;

(3) The question asked, the answers the driver gave, and the certificate of written examination issued to him pursuant to § 391.35, or a copy of a certificate which the motor carrier accepted as equivalent to a written examination pursuant to § 391.37; and

(4) The driver's name, his social security number, and the identification number, type, and issuing State of his motor vehicle operator's license.

(e) The qualification file for a driver furnished by another motor carrier and employed under the rules in § 391.65 must include—

(1) The medical examiner's certificate of his physical qualification to drive a motor vehicle or a legible photographic copy of the certificate; and

(2) A copy of a certificate from the motor carrier that regularly employs the driver stating that the driver is fully qualified to drive a motor vehicle under the rules in this part.

(f) Except as provided in paragraph (g) of this section, each driver's qualification file shall be kept at the motor carrier's principal place of business for as long as a driver is employed by that motor carrier and for 3 years thereafter.

(g) Upon a written request to, and with the approval of, the Director, Regional Motor Carrier Safety Office, for the region in which a motor carrier has his principal place of business, the carrier may retain one or more of its drivers' qualification files at a regional or terminal office. The addresses and jurisdictions of the Directors of Regional Motor Carrier Safety Offices are shown in § 390.40 of this subchapter.

[35 F.R. 6460, Apr. 22, 1970, as amended at 35 F.R. 7799, May 21, 1970; 35 F.R. 17420, Nov. 13, 1970; 36 F.R. 14741, Aug. 11, 1971]

Subpart G—Limited Exemptions[1]

§ 391.61 Drivers who were regularly employed before January 1, 1971.

The provisions of § 391.21 (relating to applications for employment), § 391.23 (relating to investigations and inquiries), § 391.31 (relating to road tests), and § 391.35 (relating to written examinations) do not apply to a driver who has been a regularly employed driver (as defined in § 395.2(f) of this subchapter) of a motor carrier for a continuous period which began before January 1, 1971, as long as he continues to be a regularly employed driver of that motor carrier. Such a driver is qualified to drive a motor vehicle if he fulfills the requirements of subparagraphs (1) through (9) of § 391.11(b) (relating to qualifications of drivers).

§ 391.62 Drivers of certain lightweight vehicles; minimum age.

A person who is 18 years of age or older and who is otherwise qualified to drive a motor vehicle under the rules in this part may drive a motor vehicle that—

---

[1] 36 F.R. 24220, Dec. 22, 1971.

(a) Has a gross weight, including its load, of 10,000 pounds or less; and

(b) Is not transporting passengers for hire; and

(c) Is not transporting hazardous materials of a type or quantity that requires the vehicle to be marked or placarded in accordance with § 177.823 of this title.

§ 391.11(b)(1) (relating to minimum age of drivers) does not apply to that person.

[36 F.R. 24220, Dec. 22, 1971]

§ 391.63 Intermittent, casual, or occasional drivers.

(a) If a motor carrier employs a person who is not a regularly employed driver (as defined in § 395.2(f) of this subchapter) to drive a motor vehicle for a single trip or on an intermittent, casual, or occasional basis, the motor carrier shall comply with all requirements of this part, except that the motor carrier need not—

(1) Require the person to furnish an application for employment in accordance with § 391.21;

(2) Make the investigations and inquiries specified in § 391.23 with respect to that person.

(3) Perform the annual review of the person's driving record required by § 391.25; or

(4) Require the person to furnish a record of violations or a certificate in accordance with § 391.27.

(b) Before a motor carrier permits a person described in paragraph (a) of this section to drive a motor vehicle, the motor carrier must obtain his name, his social security number, and the identification number, type and issuing State of his motor

vehicle operator's license. The motor carrier must retain that information in its files for 3 years after the person's employment by the motor carrier ceases.

§ 391.65 Drivers furnished by other motor carriers.

(a) A motor carrier may employ a driver who is not a regularly employed driver of that motor carrier without complying with the rules in this part with respect to the driver if—

(1) The driver is a regularly employed driver of another motor carrier;

(2) The motor carrier that regularly employs the driver furnishes a certificate that the driver is fully qualified to drive a motor vehicle under the rules in this part; and

(3) The motor carrier that uses the driver has in its files a copy of the driver's medical examiner's certificate.

(b) A motor carrier that obtains a certificate in accordance with paragraph (a)(2) of this section shall retain a copy of that certificate and a copy of the driver's medical examination certificate in its files for 3 years.

[35 F.R. 6460, Apr. 22, 1970, as amended at 36 F.R. 8452, May 6, 1971]

§ 391.67 Drivers of articulated (combination) farm vehicles.

The following rules in this part do not apply to a farm vehicle driver (as defined in § 391.3(d) who is 18 years of age or older and who drives an articulated motor vehicle:

(a) Subparagraphs (1), (8), (10), (11), and (12) of § 319.11(b) (relating to driver qualifications in general).

(b) Subpart C (relating to disclosure of, investigation into, and inquiries about the background, character, and driving record of, drivers).

(c) Subpart D (relating to road tests and written examinations).

(d) So much of §§ 391.41 and 391.45 as require a driver to be medically examined and to have a medical examiner's certificate on his person before January 1, 1973.

(e) Subpart F (relating to maintenance of files and records).
[36 F.R. 24220, Dec. 22, 1971]

PART 392—DRIVING OF MOTOR VEHICLES

* * * * * * * *

Subpart A—General

§ 392.1 Compliance required.

(a) Except as provided in paragraph (c) of this section, every motor carrier, its officers, agents, representatives, and employees responsible for the management, maintenance, operation, or driving of motor vehicles, or the hiring, supervising, training, assigning, or dispatching of drivers, shall be instructed in and comply with the rules in this part.

(b) Nothing in Parts 390-397 of this subchapter prohibits a motor carrier from requiring and enforcing more stringent rules and regulations relating to safety of operation.

(c) Intracity operations: The rules in this part do not apply to a driver or a vehicle wholly engaged in exempt intracity operations as defined in § 390.16, of this chapter.

[35 F.R. 7800, May 21, 1970, as amended at 36 F.R. 16067, Aug. 19, 1971]

§ 392.2 Applicable operating Rules.

Every motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. However, if a regulation of the Federal Highway Administration imposes a higher standard of care than that law, ordinance or regulation, the Federal Highway Administration regulation must be complied with.

[35 F.R. 7800, May 21, 1970]

§ 392.3 Ill or fatigued operator.

No driver shall operate a motor vehicle, and a motor carrier shall not require or permit a driver to operate a motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle. However, in a case of grave emergency where the hazard to occupants of the vehicle or other users of the highway would be increased by compliance with this section, the driver may continue to operate the motor vehicle to the nearest place at which that hazard is removed.

[35 F.R. 7800, May 21, 1970]

§ 392.4 Narcotics, amphetamine, and other dangerous substances.

(a) No person shall operate, or be in physical control of, a motor vehicle if he possesses, is under the influence of, or is using, any of the following substances:

(1) A narcotic drug or any derivative thereof;

(2) An amphetamine or any formulation thereof (including, but not limited to, "pep pills" and "bennies");

(3) Any other substance, to a degree which renders him incapable of safely operating a motor vehicle.

(b) No motor carrier shall knowingly require or permit a driver to violate paragraph (a) of this section.

(c) Paragraph (a) of this section does not apply to the possession or use of a substance administered to a driver by or under the instructions of a physician who has advised the driver that the substance will not affect his ability to operate a motor vehicle.

(d) As used in this section, "possession" does not include possession of a substance which is manifested and transported as part of a shipment.

[35 F.R. 7800, May 21, 1970]

§ 392.5 Intoxicating liquor.

(a) No person shall—

(1) Consume an intoxicating liquor, regardless of its alcoholic content, or be under the influence of an intoxicating liquor, within 4 hours before going on duty or operating, or having physical control of, a motor vehicle; or

(2) Consume an intoxicating liquor, regardless of its alcoholic content, or be under the influence of an intoxicting liquor, while on duty, or operating, or in physical control of, a motor vehicle; or

(3) Be on duty or operate a motor vehicle while he possesses an intoxicating liquor, regardless of its alcoholic content. However, this subparagraph does not apply to possession of an intoxicating liquor which is manifested and transported as part of a shipment.

(b) No motor carrier shall require or permit a driver to—

(1) Violate any provision of paragraph (a) of this section; or

(2) Be on duty or operate a motor vehicle if, by his general appearance or by his conduct or by other substantiating evidence, he appears to have consumed an intoxicating liquor within the preceding 4 hours.

[35 F.R. 7800, May 21, 1970]

§ 392.6 Schedules to conform with speed limits.

No motor carrier shall schedule a run nor permit nor require the operation of any motor vehicle between points in such period of time as would necessitate the vehicle being operated at speeds greater than those prescribed by the jurisdictions in or through which the vehicle is being operated.

§ 392.7 Equipment, inspection and use.

No motor vehicle shall be driven unless the driver thereof shall have satisfied himself that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and acccessories when and as needed:

Service brakes, including trailer brake connections.

Parking (hand) brake.

Steering mechanism.

Lighting devices and reflectors.

Tires.

Horn.

Windshield wiper or wipers.

Rear-vision mirror or mirrors.

Coupling devices.

§ 392.8 Emergency equipment, inspection, and use.

No motor vehicle shall be driven unless the driver thereof shall have satisfied himself that the emergency equipment required by §§ 393.95 and 393.96 of this subchapter is in place and ready for use; nor shall any driver fail to use or make use of such equipment when and as needed.

§ 392.9 Safe loading.

(a) *General.* No person shall drive a motor vehicle and a motor carrier shall not require or permit a person to drive a motor vehicle unless—

(1) The vehicle's cargo is properly distributed and adequately secured as specified in § 393.85 of this subchapter;

(2) The vehicle's tailgate, tailboard, doors, tarpaulins, its spare tire and other equipment used in its operation, and the means of fastening the vehicle's cargo are secured; and

(3) The vehicle's cargo or any other object does not obscure the driver's view ahead or to the right or left sides, interfere with the free movement of his arms or legs, prevent his free and ready access to accessories required for emergencies, or prevent the free and ready exit of any person from the vehicle's cab or driver's compartment.

(b) *Drivers of trucks and truck tractors.* Except as provided in subparagraph (4) of this paragraph, the driver of a truck or tractor must—

(1) Assure himself that the provisions of paragraph (a) of this section have been complied with before he drives that vehicle;

(2) Examine the vehicle's cargo and its load-securing devices within the first 25 miles after beginning a trip and cause

any adjustments to be made to the cargo or load-securing devices (other than steel strapping) as may be necessary to maintain the security of the vehicle's load; and

(3) Reexamine the vehicle's cargo and its load-securing devices periodically during the course of transportation and cause any adjustments to be made to the cargo or load-securing devices (other than steel strapping) as may be necessary to maintain the security of the vehicle's load. A periodic reexamination and any necessary adjustments must be made—

(i) When the driver makes a change of his duty status; or

(ii) After the vehicle has been driven for 3 hours; or

(iii) After the vehicle has been driven for 150 miles, whichever occurs first.

(4) The rules in this paragraph do not apply to the driver of a sealed vehicle who has been ordered not to open it to inspect its cargo to the driver of a vehicle that has been loaded in a manner that makes inspection of its cargo impracticable.

(c) *Buses.* No person shall drive a bus and a motor carrier shall not require or permit a person to drive a bus unless—

(1) All standees on the bus are rearward of the standee line or other means prescribed in § 393.90 of this subchapter;

(2) All aisle seats in the bus conform to the requirements of § 393.91 of this subchapter; and

(3) Baggage, freight, or express on the bus is stowed and secured in a manner which assures—

(i) Unrestricted freedom of movement of the driver and his proper operation of the bus;

(ii) Unobstructed access to all exits by any occupant of the bus; and

(iii) Protection of occupants of the bus against injury resulting from the falling or displacement of articles transported in the bus.

[36 F.R. 18863, Sept. 23, 1971, as amended at 37 F.R. 12642, June 27, 1972]

§ 392.9a Corrective lenses to be worn.

A driver whose visual acuity meets any of the minimum requirements of § 391.41 of this subchapter only when he wears corrective lenses must wear properly prescribed corrective lenses at all times while he is driving. If a driver wears contact lenses while driving, he must have a spare lens or set of lenses on his person when he drives.

[36 F.R. 8452, May 6, 1971]

§ 392.9b Hearing aid to be worn.

A driver whose hearing meets the minimum requirements of § 391.41(b)(11) of this subchapter only when he wears a hearing aid shall wear a hearing aid and have it in operation at all times while he is driving. The driver must also have in his possession a spare power source for use in the hearing aid.

[36 F.R. 12857, July 8, 1971]

* * * * * * *

Subpart E—Accidents and License Revocation; Duties of Driver[1]

§ 392.40 All accidents.

Every driver of a motor vehicle involved in an accident from which there results injury to or death of any person or persons,

or property damage of any kind, regardless of the amount, shall:

(a) Stop immediately;

(b) Take all necessary precaution to prevent further accident at the scene;

(c) Render all reasonable assistance to injured persons (movement of injured persons by a driver should not be undertaken if likely to cause further injury);

(d) Give to any person demanding the same, his name and address, the name and address of the motor carrier for whom he is then driving, the State tag registration number of the vehicle involved, and if requested, exhibit his chauffeur's or operator's license;

(e) Report all details of the accident as soon as practicable after its occurrence to the motor carrier then using his services.

§ 392.61 Driving by unauthorized person.

Except in case of emergency, no driver shall permit a motor vehicle to which he is assigned to be driven by any person not authorized to drive such vehicle by the motor carrier in control thereof.

* * * * * * *

PART 394—RECORDING AND REPORTING OF ACCIDENTS

* * * * * * *

§ 394.2 Definitions.

(a) *Recordable accident.* Any occurrence in the interstate, foreign, intrastate operations of a motor carrier subject to the

Department of Transportation Act (sec. 6, 80 Stat. 937; 49 U.S.C. 1655(e)) which involves a motor vehicle, whether loaded or empty, and which results in the death or injury of a person, or in property damage to any and all vehicles, cargo, and other property to an extent of $250 or more; except those occurrences which take place in boarding or alighting from stationary motor vehicles or in loading or unloading cargoes, unless explosives (or other dangerous articles as defined in Parts 171 to 189 of this chapter) or fire is involved. The term "recordable accidents" shall include, but is not limited to, the following:

(1) The contact of a motor vehicle, vehicle part or vehicle accessory, or of the cargo of a motor vehicle with another vehicle, a person, or an animal or any inanimate object.

(2) The overturn, running off the roadway, or rolling away from a parked position, by a motor vehicle.

(3) The unintended separation of units of a combination vehicle.

(4) Fire or explosion in or on a motor vehicle.

(5) The shifting of cargo within or upon a motor vehicle resulting in damage to property other than the cargo itself.

(6) The falling of cargo or of any person from a moving motor vehicle.

(7) Escape of any injurious, flammable or contaminating solid, liquid or gas, or of radiation from the cargo or other contents of a motor vehicle.

(8) Injury, as defined in paragraph (b) of this section, to any person in or on a motor vehicle, including injury resulting from inhalation of fumes.

(b) *Injury*. Bodily harm to any person resulting in one or more of the following:

(1) Loss of consciousness.

(2) Necessity to carry the person from the scene.

(3) Necessity for medical treatment.

(4) Disability which prevents the discharge of normal duties or the pursuit of normal activities beyond the day of the accident.

(c) *Property damage.* Physical damage, in dollars, to any and all vehicles, cargo, and other property, based upon actual cost or reliable estimates.

§ 394.3 Accident register.

(a) Every motor carrier shall have in its files at its principal place of business an accident register. Upon a written request to, and with the approval of, the Director, Regional Motor Carrier Safety Office, for the region in which a motor carrier has principal place of business, the carrier may maintain the accident register at a regional or terminal office. The addresses and jurisdictions of the Directors of Regional Motor Carrier Safety Offices are shown in § 390.40 of this subchapter. The register shall be maintained currently and contain at least the following items of information with respect to each recordable accident:

(1) Accident Claim number, or carrier's file number.

(2) Date and hour of accident.

(3) Location of the accident (city or town and State).

(4) Name of driver.

(5) Numbers of deaths and of nonfatal injuries, and amounts of damage to property, in dollars.

(6) Nature of accident such as collision, overturn, fire, cargo damage, etc.

(7) Local or intercity operation (Did run extend beyond municipal commercial zone?).

(b) A copy of each report of a recordable accident made to the Bureau of Motor Carrier Safety, Federal Highway Administration, to any State or local regulatory agency, or to any insurance company, shall be filed with the Accident Register and shall be arranged in accordance with an orderly plan which is coordinated with the entries on the Accident Register.

(c) Retention of Accident Register: The Accident Register provided for in paragraph (a) of this section and the additional information provided for in paragraph (b) of this section, shall be retained in the carrier's files at least for three years following occurrence of any accident so recorded.

(Sec. 12, 80 Stat. 931; 49 U.S.C. 1651 note) [33 F.R. 19756, Dec. 25, 1968, as amended at 36 F.R. 14741, Aug. 11, 1971]

§ 394.4 Accident reporting.

(a) Every motor carrier, except private carriers of property, shall file a report prepared on the form prescribed in this section for such carrier's use, for each recordable accident (as defined in § 394.2(a)) which occurs in the operations of such carrier.

(b) Reports of accidents involving passenger-carrying vehicles: A detailed report of every recordable accident involving a bus operated by him or it shall be prepared by the motor carrier on Form MCS 50-B.

(c) Reporting of accidents involving property-carrying vehicles: A detailed report of every recordable accident involving a motor vehicle other than a bus operated by him or it shall be prepared by the motor carrier on Form MCS 50-T.

§ 394.5 Filing of accident reports of Forms MCS 50-B (formerly BMC 50-B) and MCS 50-T.

The original and one copy of each accident report on Forms MCS 50-B and MCS 50-T, prepared in compliance with this section, shall be filed by the motor carrier as soon as possible, and in every instance within 15 days after occurrence of the accident, with the Regional Federal Highway Administrator, Bureau of Motor Carrier Safety, Federal Highway Administration, listed in § 390.40 of this subchapter for the region in which the motor carrier has his or its principal place of business: *Provided,* That motor carriers may continue to use forms BMC 50-B and BMC 50-T prescribed by the Interstate Commerce Commission until further order.

§ 394.6 Annual safety report required; private carriers.

(a) (1) Every private carrier engaged in transporting hazardous materials of such kind and in such quantities as to require that a motor vehicle be marked or placarded under the provisions of § 177.823 of this title, shall file, on or before April 1, 1969, and on or before April 1 of each year thereafter, Form MCS-51 entitled Private Carrier Annual Safety Report,[1] with the Director, Bureau of Motor Carrier Safety, Federal Highway Administration, Washington, D.C. 20591. This report shall include, in addition to the carrier's name and principal business address, the following information concerning the operations of the private carrier during the preceding calendar year:

(i) Maximum number of trucks and truck tractors operated at any time during the calendar year;

(ii) Actual number of truck and truck tractor miles operated in intrastate and interstate operations, except that estimated

[1] Filed as part of the original document.

mileage is acceptable where accurate mileage figures are not maintained;

(iii) Total number of recordable accidents as defined in § 394.2(a) including:

(a) Total number of fatalities and injuries; and

(b) Total amount of property damage in dollars;

(iv) Total number of trucks and truck tractors transporting hazardous materials of such kind and in such quantities as to require the motor vehicle to be placarded under the provisions of § 177.823 of this title by primary State of registration only; and

(v) Total number of recordable accidents as defined in § 394.2(a), involving those motor vehicles referred to in subdivision (iv) of this paragraph.

(2) The Director, Bureau of Motor Carrier Safety, upon written request and for good cause shown, may permit a private carrier to limit the information contained in the report specified in this paragraph (a) to that part of its operation involving the actual transportation of hazardous materials.

[33 F.R. 19756, Dec. 25, 1968, as amended at 37 F.R. 13471, July 8, 1972]

§ 394.7 Immediate notice of fatal accidents.

Whenever a reportable accident results in the death of any person at the time of the accident or within 24 hours thereafter, the motor carrier, whether domiciled in the United States or elsewhere, shall immediately transmit notice of such accident by telegraph or telephone to the proper Regional Federal Highway Administrator as indicated in § 394.5. Such notices shall include the following information: The date, time, and exact location of the accident; the number of persons killed and the number injured; and the name and address of the motor carrier.

(Sec. 12, 80 Stat. 931; 49 U.S.C. 1651 note)

§ 394.8 Deaths occurring before filing reports.

In addition to the requirements of § 394.7, every death shall be reported on Form MCS 50-B or Form MCS 50-T whether it occurs at the time of the accident or subsequently if such deaths occur prior to the filing of said accident report form.

(Sec. 12, 80 Stat. 931; 49 U.S.C. 1651 note)

§ 394.9 Notice of death after filing report.

Whenever any accident results in the death of any person after the motor carrier has filed his or its report of the accident on Form MCS 50-B or Form MCS 50-T, notice of such death shall be given in writing, as soon as possible after such death becomes known to the motor carrier, to the proper Regional Federal Highway Administrator as indicated in § 394.5. Such notice shall include the following information: The date and location of the accident; the name and age of the deceased; and the name and address of the motor carrier.

(Sec 12, 80 Stat. 931; 49 U.S.C. 1651 note)

§ 394.10 Carrier to assist in investigation.

Every motor carrier shall make available to the duly authorized representative or representatives of the Federal Highway Administration all records and information which in any way pertain to any reportable accident, and shall afford all reasonable assistance in the investigation of any such accident. (Sec. 12, 80 Stat. 931; 49 U.S.C. 1651 note)

§ 394.11 Supplies of accident report Forms MCS 50-B and MCS 50-T.

For the purpose of compliance with the regulations in this part, every common and contract motor carrier shall keep on hand an adequate supply of Form MCS 50-B and/or Form MCS 50-T to enable prompt reporting of accidents.[2]

§ 394.12 Instructions for preparing accident reports.

Reports of accidents on Form MCS 50-B and Form MCS 50-T shall be prepared in accordance with the following instructions:

General: Every applicable item, and the detachable stub, must be filled in as fully and as accurately as information accessible to the motor carrier at the time of filing the report will permit.

Item 1: Enter name of legal entity.

Item 2: Check "Yes" if you have been notified that your revenues place you in Class I. Otherwise check "No."

Item 3: Enter the address of your principal place of business.

Item 4: Always make two entries under this item: First, show whether the operation involved is common, contract, or exempt. Second, enter your docket (MC) number if you have one. Otherwise enter "none."

Item 5: Enter all three names, State, county, and city or town in or near which accident occurred.

---

[2] Supplies of these forms may be obtained from the Superintendent of Documents, Washington, D.C. 20402, at prevailing cost.

Item 9: Under this item give information fixing the accident location as nearly exactly as possible. This is especially important when highway design or condition, or some other local feature was involved in any way.

Item 15: Indicate the commodities which compose the vehicle's cargo, and not merely the class of such cargo. For example: enter "gasoline" or "No. 2 fuel oil" rather than "petroleum products."

Item 16(b), on MCS 50-T only: If a second driver was on the vehicle, whether he is called a relief driver, a helper driver, or by some other designation, check "Yes."

Item 17, on MCS 50-T and 18 on MCS 50-B: If the vehicle, or any unit of a combination of vehicles, was itself the cargo being transported, by the driveaway-towaway method, check "Yes"; otherwise check "No."

Item 18(a), on MCS 50-T only: Check "Yes" only if the vehicle was equipped with a berth meeting the specifications set forth in the Motor Carrier Safety Regulations.

Item 19(b), on MCS 50-T only: If the power unit was owned by the driver whose name is reported under item 20, check "Yes." If it was owned by the person riding as relief driver at the time of the accident, write in the words "relief driver" and check "Yes."

Item 20: Enter the name and home address of the person at the wheel when the accident occurred, or who last drove the vehicle if it was stopped or parked without a driver at the time of the accident.

Items 21 through 30: These items are to be filled in whether the driver was operating a company-owned vehicle, a vehicle which he himself owned and leased to the carrier, or a vehicle owned by a third party and leased to the carrier.

Item 23: Accuracy in entering the Social Security Number is very important. Error in entering any one of the nine digits which comprise this number or the omission of a digit, will render the number useless.

Items 28 and 29: If the driver has made use of the sleeper-berth provisions for breaking his off-duty time into two periods totaling 8 hours, write in the words "sleeper berth" in addition to entering the hours on duty and hours driving since last period of 8 consecutive hours of duty.

Items 33 and 34: If another vehicle involved in the accident was operated by a motor carrier, regardless of ownership, the name and address of that motor carrier should be given.

Item 37: Enter the best available estimate of the amount of damage (in dollars) to each vehicle or unit of a combination of vehicles involved in the accident. Make this entry in every case, whether or not it is also reported that the vehicle or unit was a total loss.

If damage to a vehicle or unit is so extensive that it is not practical to repair it, check the appropriate space to indicate that it was a total loss.

If any vehicle or unit involved in the accident was not damaged, write "none" in the appropriate space.

Items 38, 39, and 40: For each person either killed or injured in the accident, enter name, address and age, if known, or approximate age, and check all applicable boxes. The number of checks necessary to give full information will vary for different persons. For example: John Smith may have been affected by carbon monoxide and also burned, the degree of his injuries being serious. If he were driver in vehicle No. 1, the total number of check marks required to report these facts would be five. On the other hand, Mary Brown

may have been struck and killed instantly as she walked across the street. Two boxes only need be checked "killed outright" and "pedestrian."

If no one was killed or injured, enter the word "none" under item 38.

Item 42: Check each defect known to exist before the accident, brought to light by the accident itself, or discovered by investigation following the accident. Do not show breakage of sound parts which resulted from the accident. Include defects which caused the vehicle to be stopped, if accident occurred while it was so stopped.

Item 43: If opposing lanes of travel are separated by a parkway or other strip, check the word "Divided" in addition to showing the total number of lanes.

Item 46: Whenever the driver survives the accident and is able to make a statement, his own account of the accident is to be entered here. The account obtained from the driver for this purpose must be sufficiently complete and detailed to convey an understanding of his version of the accident. This account should be continued on an extra sheet of paper if more space is needed.

Item 47: An account of the accident containing the most reliable information to which the motor carrier has access at the time of reporting, sufficiently detailed and complete to convey an understanding of his version of the accident, shall be entered under this item, and shall be signed by a responsible official of the motor carrier. This account should be continued on an extra sheet of paper if more space is needed.

Diagram. In addition, a diagram showing pertinent highway information such as the approximate angle at which roads intersect, the width of pavement and of shoulders, etc., the course of travel of each vehicle involved, and the point at

which collision occurred, should be prepared in those cases in which such a diagram would clarify the presentation of the facts.

PART 395—HOURS OF SERVICE OF DRIVERS

* * * * * * * *

§395.1 Compliance with, and knowledge of regulations, required.

Every motor carrier and its officers, drivers, agents, employees, and representatives shall comply with the following regulations, and every motor carrier shall require that its officers, drivers, agents, employees, and representatives be conversant with this part.

§ 395.2 Definitions.

As used in this part, the following words and terms are construed to mean:

(a) *On-duty time.* All time from the time a driver begins to work or is required to be in readiness to work until the time he is relieved from work and all responsibility for performing work. The term "On-duty" time shall include:

(1) All time at a carrier or shipper plant, terminal, facility, or other property, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the motor carrier.

(2) All time inspecting equipment as required by §§ 392.7 and 392.8 or otherwise inspecting, servicing, or conditioning any motor vehicle at any time;

(3) All driving time as defined in paragraph (b) of this section;

(4) All time,other than driving time, in or upon any motor vehicle except time spent resting in a sleeper berth as defined in paragraph (g) of this section;

(5) All time loading or unloading a vehicle, supervising, or assisting in the loading or unloading, attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle, or in giving or receiving receipts for shipments loaded or unloaded.

(6) All time spent performing the driver requirements of §§ 392.40 and 392.41 relating to accidents;

(7) All time repairing, obtaining assistance, or remaining in attendance upon a disabled vehicle;

(8) Performing any other work in the capacity of, or in the employ or service of, a common, contract or private motor carrier.

(9) In the case of specially trained drivers of specially constructed oil well servicing vehicles, on-duty time shall not include waiting time at a natural gas or oil well site: *Provided,* That all such time shall be fully and accurately accounted for in records to be maintained by the motor carrier. Such records shall be made available upon request of the Federal Highway Administration.

(b) *Driving time.* The term "drive" and "driving time" shall include all time spent at the driving controls of a motor vehicle in operation. All stops made in any one village, town, or city, may be computed as one.

(c) *Seven consecutive days.* The term "7 consecutive days" means the period of 7 consecutive days beginning at 12:01 a.m. on any day.

(d) *Eight consecutive days.* The term "8 consecutive days" means the period of 8 consecutive days beginning at 12:01 a.m. on any day.

(e) *Twenty-four consecutive hours.* The term "24 consecutive hours" means any such periods starting at the time the driver reports for duty as defined in paragraph (a) of this section.

(f) *Regularly employed driver.* The term "regularly employed driver" means a driver who in any period of 7 consecutive days is employed or used as a driver solely by a single motor carrier.

(g) *Sleeper berth.* The term "sleeper berth" means a berth conforming to the requirements of § 393.76 of this subchapter.

(h) *Driver-salesman.* The term "driver-salesman" means any employee who is employed solely as such by a private carrier of property by motor vehicle, who is engaged both in selling goods, services, or the use of goods, and in delivering by motor vehicle the goods sold or provided or upon which the services are performed, who does so entirely within a radius of 100 miles of the point at which he reports for duty, who devotes not more than 50 percent of his hours on duty to driving time. The term "selling goods" for purposes of this subsection shall include in all cases solicitation or obtaining of reorders or new accounts, and may also include other selling or merchandising activities designed to retain the customer or to increase the sale of goods or services, in addition to solicitation or obtaining of reorders or new accounts.

§ 395.3 Maximum driving and on-duty time.

(a) Except as provided in paragraphs (c) and (e) of this section and in § 395.10, no motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive more than 10 hours following 8 consecutive hours off

duty or drive for any period after having been on duty 15 hours following 8 consecutive hours off duty: *Provided, however,* That drivers using sleeper-berth equipment, or off duty at a natural gas or oil well location, may cumulate the aforementioned total of at least 8 hours off duty in two periods of at least 2 hours each, resting in a sleeper berth, as defined in § 395.2(g), or resting while off duty in other sleeping accommodations at a natural gas or oil well location.

(b) Except as provided in paragraph (e) of this section, no motor carrier shall permit or require any driver used by it to be on duty, nor shall any such driver be on duty, more than 60 hours in any 7 consecutive days as defined in § 395.2(c) regardless of the number of motor carriers using the driver's services. *Provided, however,* That carriers operating vehicles every day in the week may permit drivers to remain on duty for a total of not more than 70 hours in any period of 8 consecutive days. *Provided further, however,* That the limitations of this paragraph shall not apply with respect to any driver-salesman whose total driving time does not exceed 40 hours in any 7 consecutive days.

(c) The provisions of paragraph (a) of this section shall not apply with respect to drivers used wholly in driving motor vehicles having not more than 2 axles and whose gross weight, as defined in § 390.10, does not exceed 10,000 pounds, unless such vehicle is used to transport passengers or explosives or other dangerous articles of such type and in such quantity as to require the vehicle to be specifically marked or placarded under the Hazardous Materials Regulations, § 177.823 of this Title, or when operated without cargo under conditions which require the vehicle to be so marked or placarded under the cited regulations: *Provided further, however,* That this section shall not apply with respect to drivers of motor vehicles engaged solely in making deliveries for retail stores during the period from December 10 to December 25, both inclusive, of each year.

(d) In the instance of drivers of motor vehicles used exclusively in the transportation of oilfield equipment, including the stringing and picking up of pipe used in pipelines, and servicing of the field operations of the natural gas and oil industry any period of 8 consecutive days may end with the beginning of any off-duty period of 24 or more successive hours.

(e) A driver who is driving a motor vehicle in the State of Alaska must not drive or be permitted to drive more than 15 hours following 8 consecutive hours off duty. A driver who is driving a motor vehicle in the State of Alaska must not drive or be permitted to drive after he thas been on duty for 20 hours or more following 8 consecutive hours off duty. A driver who drives a motor vehicle in the State of Alaska must not be on duty or be permitted to be on duty more than—

(1) 70 hours in any period of 7 consecutive days, if the carrier for whom he drives does not operate every day in the week; or

(2) 80 hours in any period of 8 consecutive days, if the carrier for whom he drives operates every day in the week.

[36 F.R. 20369, Oct. 21, 1971]

§ 395.6 Sleeper berth, occupation.

No sleeper berths shall be occupied by more than one person at any time.

§ 395.7 Travel time.

When a driver at the direction of a motor carrier is traveling, but not driving or assuming any other responsibility to the carrier, such time shall be counted as on-duty time unless the driver is afforded at least 8 consecutive hours off duty when arriving at destination, in which case he shall be considered off duty for the entire period.

§ 395.8 Driver's daily log.

(a) Except as provided in paragraph (t) of this section, every motor carrier shall require that a driver's daily log, Form MCS-59 set forth below, shall be made in duplicate by every driver used by him or it and every driver who operates a motor vehicle shall make such a log. Failure to make logs, failure to make required entries therein, falsification of entries or failure to preserve logs shall make both the driver and the carrier liable to prosecution. Driver's logs shall be prepared and retained in accordance with the provisions of paragraphs (b) through (s) of this section.

(b) *Entries to be current.* Drivers shall keep to log current to the time of the last change of duty status.

(c) *Entries made by driver only.* Except that the name and principal place of business address of the carrier may be printed, all entries shall be made by the driver in his own handwriting.

(d) *Date.* Enter month, day, and year for each calendar day on or off duty.

(e) *Total mileage.* Total mileage entered shall be that mileage traveled while driving, on duty but not driving, and resting in a sleeper berth, as defined in § 395.2(g) during the day covered by the log. Mileage while driving shall be shown separately.

(f) *Vehicle identification.* The carrier's vehicle number or numbers or the State and license number or numbers of each vehicle or unit of a combination operated during the calendar day shall be entered.

(g) *Name of carrier.* The name or names of the carrier or carriers shall be that or those for which duty is performed. When work is performed for more than one carrier on the same calendar day, the beginning and finishing time, showing a.m. or p.m., worked for each carrier shall be shown after each carrier name.

Drivers of leased vehicles shall show the name of the carrier performing the transportation.

(h) *Driver's signature.* The driver shall certify to the correctness of the log by signing his first name and last name in full and his middle name or middle initial, if any. Below the driver's signature he shall list the initials and last name of each codriver.

(i) *Home terminal.* The driver's home terminal address shown shall be that at which he normally reports for duty.

(j) *Time base to be used.* The log shall be prepared, maintained and submitted, using the time standard in effect at the driver's home terminal, for a 24-hour calendar day beginning at midnight: *Provided, however,* That if written notification is given by a carrier to the Regional Federal Highway Administrator of the Bureau of Motor Carrier Safety for the region in which the carrier's principal office is located, drivers of any named terminal or terminals of the carrier may prepare logs for a 24-hour period beginning at noon of 1 day and ending at noon of the next succeeding day. For drivers preparing logs on a noon-to-noon basis, the term 7 or 8 consecutive days means the period of 7 or 8 consecutive days beginning at 12:01 p.m., on any day.

(k) *Line 1, Off duty.* Except for time spent resting in a sleeper berth, a continuous line shall be drawn between the appropriate time markers to record the period or periods of time when the driver is not on duty, not required to be in readiness to work, or is not under any responsibility for performing work.

(l) *Line 2, Sleeper berth.* A continuous line shall be drawn between the appropriate time markers to record the period or periods of time off duty resting in a sleeper berth, as defined in § 395.2(g).

(m) *Line 3, Driving.* A continuous line shall be drawn between the appropriate time markers to record the period or periods of time on duty driving a motor vehicle, as defined in § 395.2(b).

(n) *Line 4, On duty not driving.* A continuous line shall be drawn between the appropriate time markers to record the period or periods of time on duty not driving specified in § 395.2(a)(1), (2), (4), (5), (6), (7), (8), or any other time on duty but not driving as defined by §§ 395.2(a) and 395.7.

(o) *Remarks.* The appropriate time marker and the name of the city, town, or village, with State abbreviation, or place at or near which each change of duty occurs, shall be recorded, such as the place of reporting for work, starting to drive, on duty not driving, and where released from work. Explain the reason resulting in hours exceeding those permitted by § 395.3. Show the transportation performed each day by entering a shipping document number or numbers, or name of a shipper and commodity.

(p) *Total hours.* The total hours in each duty status: Off duty other than in a sleeper berth; off duty in a sleeper berth; driving; and on duty not driving shall be entered, the total of which entries shall equal 24 hours.

(q) *Origin and destination.* The name of the place where a trip begins and the final destination or farthest turn-around point shall be shown at the bottom of the log. If the trip requires more than 1 calendar day, the log for each day shall show the origin and final destination. If a driver departs from and returns to the same place on any day, the destination shall be indicated by entering the farthest point reached followed by the words "and return."

(r) *Filing driver's log.* The driver shall forward each day the original log to his home terminal or to the motor carrier's principal place of business. When the services of a driver are used by more than one carrier during any calendar day, the driver shall furnish each such carrier a copy of the log containing full and complete entries including: The entry of all duty time for the entire day; the name of each such carrier served by the driver that day; and the beginning and finishing time, showing

a.m. or p.m., worked for each carrier. Motor carriers when using a driver for the first time or intermittently shall obtain from the driver a signed statement giving the total time on duty during the immediately preceding 7 days and time at which such driver was last relieved from duty prior to beginning work for such carrier.

(s) *Retention of driver's log.* Daily logs for each calendar month may be retained at the driver's home terminal until the 20th day of the succeeding calendar month and shall then be forwarded to the carrier's principal place of business where they shall be retained for 12 months from date of receipt. However, upon a written request to, and with the approval of, the Director, Regional Motor Carrier Safety Office, for the region in which a motor carrier has his principal place of business, a motor carrier may forward and retain such logs at a regional or terminal office. The addresses and jurisdictions of the Directors of Regional Motor Carrier Safety Offices are shown in § 390.40 of this subchapter. The driver shall retain a copy of each daily log for 30 days which shall be in his possession while on duty.

(t) *Driver's log, when not required.* The requirements of this section shall not apply: (1) To any regularly employed driver who drives wholly within a radius of 50 miles of the garage or terminal at which he reports for work: *Provided,* That the motor carrier employing such driver maintains and retains for period of 1 year accurate and true records showing the total number of hours the driver is on duty per day and the time at which the driver reports for and is released from duty each day; or (2) to drivers of motor vehicles having not more than 2 axles and whose gross weight, as defined in § 390.10, does not exceed 10,000 pounds, unless such vehicle is used to transport passengers or explosives or other dangerous articles of such type and in quantity as to require the vehicle to be specifically marked or placarded under the Hazardous Materials Regulations, § 177.823 of this Title, or when operated without cargo under conditions which require the vehicle to be so marked or pla-

carded under the cited regulations. [Form of driver's log omitted.]

* * * * * * *

PART 396—INSPECTION AND MAINTENANCE

* * * * * * *

§ 396.1—Compliance.

(a) Except as provided in paragraph (b) of this section, every motor carrier, its officers, drivers, agents, representatives, and employees directly concerned with the inspection or maintenance of motor vehicles, shall comply and be conversant with the requirements of this part.

(b) Intracity operations: The rules in this part do not apply to a driver or a vehicle wholly engaged in exempt intracity operations as defined in § 390.16 of this chapter.

[36 F.R. 16067, Aug. 19, 1971]

§ 396.2—Inspection and maintenance.

Every motor carrier shall systematically inspect and maintain, or cause to be systematically maintained, all motor vehicles subject to its control, and the accessories required by Part 393 of this subchapter, to be mounted thereon, to insure that such motor vehicles and accessories are in safe and proper operating condition. Such inspections, for buses, shall include a test at least once every 90 days of all push-out windows and emergency doors to determine that they are operating properly and that the windows comply with the requirements of Subpart D of Part 393 of these regulations. A systematic inspection and maintenance record shall be maintained for each motor vehicle controlled by a motor carrier for the period during which such ve-

hicle is subject to the motor carrier's control. Such records shall include, at least: (a) An identification of the vehicle including make, model, serial number, and number of tires, their size, and number of ply; (b) a record of inspection and repairs indicating their date and nature; (c) a lubrication record; (d) a systematic means for indicating for each vehicle the nature and due date of the various inspection and maintenance operations to be performed; (e) if leased, or otherwise contracted for, such records shall also include an identification of the lessor or contractor furnishing the motor vehicle. (Recommend procedure and forms set forth in § 396.9.)

§ 396.3 Lubrication.

Every motor carrier shall institute such procedures as may be necessary to insure that motor vehicles are properly lubricated; that proper action is taken to correct oil and grease leaks; that undue accumulations of grease and oil are investigated, removed, and the cause thereof corrected.

§ 396.4 Unsafe operations forbidden.

No motor carrier shall permit or require a driver to drive any motor vehicle revealed by inspection or operation to be in such condition that its operation would be hazardous or likely to result in a breakdown of the vehicle nor shall any driver drive any motor vehicle which by reason of its mechanical condition is so imminently hazardous to operate as to be likely to cause an accident or a breakdown of the vehicle. If while any motor vehicle is being operated on a highway, it is discovered to be in such unsafe condition, it shall be continued in operation only to the nearest place where repairs can safely be effected, and even such operations shall be conducted only if it be less hazardous to the public than permitting the vehicle to remain on the highway.

§ 396.5 Inspection of motor vehicles in operation.

(a) *Personnel authorized to perform inspections.* Every field safety specialist, mechanical engineer, safety supervisor, regional safety officer, and safety compliance investigator employed in the Bureau of Motor Carrier Safety, Federal Highway Administration, is authorized and hereby ordered, to enter upon and perform inspections of motor carriers' vehicles in operation.

(b) Prescribed inspection report. Form MCS 63, Driver-Equipment Compliance Check shall be used to record findings from motor vehicles selected for final inspection by authorized employees.

(c) *Motor vehicles declared "out of service."* (1) Authorized employees shall declare and mark "out of service" any motor vehicle which by reason of its mechanical condition or loading is so imminently hazardous to operate as to be likely to cause an accident or a breakdown. Form MCS 64, "Out of Service Vehicle" sticker, shall be used to mark vehicles "out of service."

(2) No motor carrier shall require or permit any person to operate nor shall any person operate any motor vehicle declared and marked, "out of service" until all repairs required by the "out of service notice" on Form MCS 63 have been satisfactorily completed. The term operate as used in this section shall include towing the vehicle: *Provided, however,* That vehicles marked "out of service" may be towed away by means of a vehicle using a crane or hoist: *And provided further,* That the vehicle combination consisting of the emergency towing vehicle and the "out of service" vehicle meets the performance requirements of § 393.52.

(3) No person shall remove the "Out of Service Vehicle" sticker from any motor vehicle prior to completion of all repairs required by the "out of service notice" on Form MCS 63.

(4) The person or persons completing the repairs required by the "out of service notice" shall sign the "Certification of

Repairman" in accordance with the terms prescribed on Form MCS 63, entering the name of his shop or garage and the date and time the required repairs were completed. If the driver completes the required repairs, he shall sign and complete the "Certification of Repairman."

(d) *Motor Carrier's disposition of Form MCS 63.* (1) The driver of any motor vehicle receiving a Form MCS 63 shall deliver such MCS 63 to the motor carrier operating the vehicle upon his arrival at the next terminal or facility of the motor carrier, if such arrival occurs within twenty-four (24) hours. If the driver does not arrive at a terminal or facility of the motor carrier operating the vehicle within twenty-four (24) hours he shall immediately mail the Form MCS 63 to the motor carrier: *Provided, however,* That for operating convenience, motor carriers may designate any shop, terminal, facility or person to which it may instruct its drivers to deliver or forward Form MCS 63; *Provided further, however,* That it shall be the sole responsibility of the motor carrier that Form MCS 63 is returned to the Federal Highway Administration, in accordance with the terms prescribed thereon and in subparagraphs (2) and (3) of this paragraph. A driver, if himself a motor carrier, shall return Form MCS 63 to the Federal Highway Administration, in accordance with the terms prescribed thereon and in subparagraphs (2) and (3) of this paragraph.

(2) Motor carriers shall carefully examine Forms MCS 63. Any and all violations or mechanical defects noted thereon shall be corrected. To the extent drivers are shown not to be in compliance with the Motor Carrier Safety Regulations, appropriate corrective action shall be taken by the motor carrier.

(3) Motor carriers shall complete the "Motor Carrier Certification of Action Taken" on Form MCS 63 in accordance with the terms prescribed thereon. Motor carriers shall return Forms MCS 63 to the Director, Regional Motor Carrier Safety Office of the Bureau of Motor Carrier Safety, Federal Highway

Administration, at the address indicated upon Form MCS 63 within fifteen (15) days following the date of the vehicle inspection.

§ 396.6 Damaged vehicles, inspection.

No motor carrier shall permit or require a driver to drive nor shall any driver drive a motor vehicle which has been damaged in an accident or by other cause until inspection has been made by a person qualified to ascertain the nature and extent of the damage and the relationship of such damage to the safe operation of the motor vehicle, nor shall such motor vehicle be operated until such person has determined it to be in safe operating condition.

§ 396.7 Vehicle condition report by driver.

Except as provided for driveaway-towaway operations in § 396.8, every motor carrier operating more than one motor vehicle shall require its drivers to report and every driver shall prepare such a report in writing at the completion of his day's work or tour of duty, which report shall list any defect or deficiency of the motor vehicle discovered by said driver or reported to him as would be likely to affect the safety of operation of the motor vehicle or result in its mechanical breakdown or shall indicate that no such defects or deficiencies were discovered by or reported to him. Such reports shall be carefully examined, the defects reported thereon shall be checked and the report shall be retained by the motor carrier for a period of at least 3 months.

§ 396.8 Driveaway-towaway operations, inspections.

Every motor carrier, with respect to motor vehicles engaged in driveaway-towaway operations, shall comply with this section in addition to §§ 396.1 to 396.7, inclusive, except that the driver's "Vehicle Condition Report" required by § 396.7 and

the maintenance records required by § 396.2 shall not be required for any vehicle which is part of the shipment being delivered. Before the beginning of any driveaway-towaway operation of motor vehicles in combination, the motor carrier shall make a careful inspection and test to ascertain that the tow-bar or saddle-mount connections are properly secured to the towed and towing vehicles, that they function adequately without cramping or binding of any of the parts, and that the towed motor vehicle follows substantially in the path of the towing vehicle without whipping or swerving. Every motor carrier shall maintain practices to insure that following completion of any trip in a driveaway-towaway operation of motor vehicles in combination, and before they are used again, the tow-bars and saddle-mounts are disassembled and inspected for worn, bent, cracked, broken, or missing parts. Before reuse, suitable repair or replacement shall be made of any defective parts and the devices shall be properly reassembled.

§ 369.9 Recommended practices and forms.

The following practices and forms are recommended to motor carriers for consideration as one means of establishing the inspection and maintenance practices which are required by §§ 396.2 to 396.8.

(a) *Report of vehicle condition.* As a convenient means of providing for the report required by § 396.7, the "Driver's Vehicle Condition Report" at the end of this paragraph is suggested. The items are arranged in a logical order of inspection. While the regulations do not require a written report of the inspection prior to driving, the form may be adapted for such a report by duplicating the text of the following form and using an appropriate heading. Changes may be made to suit the particular carrier's operations, such as by providing for the recording of more than one inspection on a single form. [Forms omitted.]

* * * * * * *

49 CFR Parts 1057 and 1058

PART 1057—LEASE AND INTERCHANGE OF VEHICLES

Sec.

1057.1 Applicability.

1057.2 Definitions.

1057.3 Exemptions.

1057.4 Augmenting equipment.

1057.5 Interchange of equipment.

1057.6 Rental of equipment to private carriers and shippers.

AUTHORITY: The provisions of this Part 1057 issued under sec. 204, 49 Stat. 546, as amended; 49 U.S.C. 304.

SOURCE: The provisions of this Part 1057 appear at 32 F.R. 20056, Dec. 20, 1967, unless otherwise noted.

§ 1057.1 Applicability.

The rules and regulations in this part apply to the augmenting of equipment by common and contract carriers of property by motor vehicle in interstate or foreign commerce subject to Part II of the Interstate Commerce Act, 49 U.S.C. 301 et seq.; to the interchange of equipment between such common carriers of property by motor vehicle, and to the lease of equipment by common and contract carriers of property by motor vehicle, with or without drivers, to private motor carriers and shippers.

§ 1057.2 Definitions.

(a) *Authorized carrier.* A person or persons authorized to engage in the transportation of property as a common or contract

carrier under the provisions of section 206, 207, or 209 of the Interstate Commerce Act, 49 U.S.C. 306, 307, or 309.

(b) *Equipment.* A motor vehicle, straight truck, tractor, semi-trailer, full trailer, combination tractor-and-trailer, combination straight truck and full trailer, and any other type of equipment used by authorized carriers in the transportation of property for hire.

(c) *Interchange of equipment.* The physical exchange of equipment between motor common carriers or the receipt by one such carrier of equipment from another such carrier, in furtherance of a through movement of traffic, at a point or points which such carriers are authorized to serve.

(d) *Regular employee.* A person not merely an agent but regularly in exclusive full-time employment.

(e) *Agent.* A person duly authorized to act for and on behalf of an authorized carrier.

(f) *Owner.* A person (1) to whom title to equipment has been issued, or (2) who as lessee, has the right to exclusive use of equipment for a period longer than 30 days, or (3) who has lawful possession of equipment and has the same registered and licensed in any State or States or the District of Columbia in his or its name.

(g) *Private carrier.* A person as defined in § 203(a)(17) of the Interstate Commerce Act.

(h) *Shipper.* A pesron who consigns or receives property which is transported in interstate or foreign commerce.

§ 1057.3 Exemptions.

The provisions of § 1057.4, except paragraphs (c) and (d), relative to inspection and identification of equipment, shall not apply:

(a) *Equipment used in the direction of a point which lessor is authorized to serve.* To equipment owned or held under a lease of 30 days or more by an authorized carrier and regularly used by it in the service authorized, and leased by it to another authorized carrier for transportation in the direction of a point which lessor is authorized to serve: ***Provided,*** That the two carriers have first agreed in writing that control and responsibility for the operation of the equipment shall be that of the lessee from the time the equipment passes the inspection required to be made by lessee or its representative under § 1057.4(c) until such time as the lessor or its representative shall give to the lessee or its representative a receipt specifically identifying the equipment and stating the date and the time of day possession thereof is retaken or until such time as the required inspection is completed by another authorized carrier taking possession of the equipment in an interchange of equipment where such use is contemplated, such writing to be signed by the parties or their duly authorized regular employees or agents, and a copy thereof carried in the equipment while the equipment is in the possession of the lessee.

(b) *Rail or express vehicles.* To equipment utilized wholly or in part in the transportation of railway express traffic, or in substituted motor-for-rail transportation of railroad freight moving between points that are railroad stations on railroad billing.

(c) *Commercial zone operations.* To equipment utilized in transportation performed solely and exclusively within any municipality, contiguous municipalities, or commercial zone, as defined by the Commission.

(d) *Vehicles without drivers from rental companies.* To the lease of equipment without drivers by an authorized carrier from an individual, copartnership, or corporation, whose principal business is the leasing of equipment without drivers for compensation.

(e) *Non-powered equipment.* To equipment other than a power unit, provided that such equipment is not drawn by a power unit leased from the lessor of such equipment.

§ 1057.4 Augmenting equipment.

Other than equipment exchanged between motor common carriers in interchange service as defined in § 1057.5, authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:

(a) *Contract requirements.* The contract, lease, or other arrangement for the use of such equipment:

(1) *Parties.* Shall be made between the authorized carrier and the owner of the equipment.

(2) *Written contract required.* Shall be in writing and signed by the parties thereto, or their regular employees or agents duly authorized to act for them in the execution of contracts, leases, or other arrangements.

(3) *Minimum duration of 30 days when operated by lessor.* Shall specify the period for which it applies, which shall be not less than 30 days when the equipment is to be operated for the authorized carrier by the owner or employee of the owner; excepting:

(i) *Equipment used in agricultural or perishable operations.* That subject to the proviso in (*c*) of this subdivision such 30-day minimum period shall not apply to equipment, with driver:

(*a*) Where the motor vehicle so to be used is that of a farmer or a cooperative association or a federation of cooperative associations, as specified in section 203 (b) (4a) or (5) of the Interstate Commerce Act, or is that of a private carrier of property by motor vehicle as defined in section 203(a)(17) of the

Act and is used regularly in the transportation of property of a character embraced within section 203(b)(6) of the Act or perishable products manufactured from perishable property of a character embraced within section 203(b)(6), and such motor vehicle is to be used by the motor carrier in a single movement or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based; or

(*b*) Where the motor vehicle so to be used is one which has completed a movement covered by section 203(b)(6) of the Act and such motor vehicle is next to be used by the motor carrier in a loaded movement in any direction, and/or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based; and

(*c*) *Provided,* In either instance that prior to the execution of the lease, the authorized carrier receives and retains a statement signed by the owner of the equipment, or someone duly authorized to sign for the owner, authorizing the driver to lease the equipment for the movement or movements contemplated by the lease, certifying that the equipment so leased meets the qualifications enumerated in (a) or (b) of this sub-section, and specifying the origin, destination, and the time of the beginning and ending of the last movement which brought the equipment within the purview of this subsection.

(ii) *Automobile and tank truck carriers.* That such 30-day minimum period shall not apply to equipment owned or held under lawful lease by an authorized automobile carrier or tank truck carrier and used in the transportation of motor vehicles or commodities in bulk, respectively, when leased or subleased to other such authorized carriers.

(iii) *Ice and snow control purposes.* That such 30-day minimum period shall not apply to dump equipment leased or

subleased for use in transporting salt and calcium chloride, in bulk, for ice and snow control purposes, during the period from November 1 to April 30, both inclusive, of each year.

(4) *Exclusive possession and responsibilities.* Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except:

(i) *Lessee may be considered as owner.* Provision may be made therein for considering the lessee as the owner for the purpose of subleasing under these rules to other authorized carriers during such duration.

(ii) *Household goods, carrier; intermittent operations under long-term lease.* When entered into by authorized carriers of household goods, for the transportation of household goods, as defined by the Commission, such provisions need only apply during the period the equipment is operated by or for the authorized carrier, lessee.

(5) *Compensation to be specified.* Shall specify the compensation to be paid by the lessee for the rental of the leased equipment. Subject to the exemption provisions of paragraph (a) (3) (i) of § 1057.4, and except to the extent that amounts paid for the same operations to the lessor in the form of specific fuel cost adjustments pursuant to the provisions of the Interstate Commerce Commission's Special Permission Order No. 74-2525, entered February 7, 1974, and modified February 8, 1974, or designated surcharge procedures, compensation paid by the lessee shall, on and after February 15, 1974, be increased by an amount equal to the increased costs of fuel purchased at lawful prices and borne by the lessor, provided the lessor is responsible for supplying the fuel consumed in operations conducted under the lease. The amount of such increase shall be; (i) Added to the compensation paid the lessor for the

leased equipment; and (ii) computed by: (A) Subtracting from the lawful prices actually paid or to be paid by the lessor (and authenticated by him by presentation to the lessee of valid receipts for fuel actually purchased) and consumed in the operations for which the equipment is leased, the lawful price paid by the lessor of the same type of fuel in effect on May 15, 1973, provided fuel was purchased by him on that date; and (B) reducing such difference by any amounts as are paid for the same operations to the lessor in the form of specific fuel-cost adjustments resulting from increases in the carriers' rates or charges obtained subsequent to May 15, 1973. In the event fuel was not purchased by the lessor on May 15, 1973, the purchase date to be used in lieu thereof for the computations required in (ii) above shall be: (a) The date of the purchase of fuel last preceding May 15, 1973; or, (b) if the equipment was first leased on a date subsequent to May 15, 1973, the date of the lessor's first purchase of fuel for operations conducted under a leasing arrangement.

(6) *Duration to be specific.* Shall specify the time and date of the circumstances on which the contract, lease, or other arrangement begins, and the time or the circumstances on which it ends. The duration of the contract, lease or other arrangement shall coincide with the time for the giving of receipts for the equipment as required by paragraph (b) of this section; and

(7) *Copies of lease and their distribution; copy to be carried on vehicle.* Shall be executed in triplicate; the original shall be retained by the authorized carrier in whose service the equipment is to be operated, one copy shall be retained by the owner of the equipment, one copy shall be carried on the equipment specified therein during the entire period of the contract, lease, or other arrangement, unless a certificate as provided in paragraph (d) (2) of this section is carried in lieu thereof.

(b) *Receipts for equipment to be specific.* When possession of the equipment is taken by the authorized carrier or its regular

employee or agent duly authorized to act for it, said carrier, employee or agent shall give to the owner of the equipment, or the owner's employee or agent, a receipt specifically identifying the equipment and stating the date and the time of day possession thereof is taken; and when the possession by the authorized carrier ends; it or its employee or agent shall obtain from the owner of the equipment, or its regular employee or agent duly authorized to act for it, a receipt specifically identifying the equipment and stating therein the date and the time of day possession thereof is taken.

(c) *Safety inspection of equipment by the authorized carrier.* It shall be the duty of the authorized carrier, before taking possession of equipment, to inspect the same or to have the same inspected by a person who is competent and qualified to make such inspection and has been duly authorized by such carrier to make such inspection as a representative of the carrier, in order to insure that the said equipment complies with the Motor Carrier Safety Regulations of the Federal Highway Administration of the Department of Transportation. The person making the inspection shall certify the results thereof on a report in the form hereinafter set forth, which report shall be retained and preserved by the authorized carrier, and if his inspection discloses that the equipment does not comply with the requirements of the said safety regulations, possession thereof shall not be taken. When such an inspection has been made, the authorized carrier or an officer or partner thereof, or a safety director or other supervisory employee responsible for safety compliance, shall certify on the inspection report that the person who made the inspection, whether an employee or person other than an employee, is competent and qualified to make such inspection and has been duly authorized to do so by such carrier as its representative. When equipment other than a power unit is leased, a form of report applicable to such equipment may be used.

Report of Vehicle Inspection

Description of vehicle:

Make ..... Year .....

Model ..... Serial No. .....

Type: Tractor ..... Trailer .....

Semitrailer .....

License plate: No. ..... State .....

Owner's name .....

Name of authorized carrier .....

Indicate in the proper column the result of the inspection of each item listed:

Item	Not defective	Defective	Description of defect
Body			
Brakes			
Cooling system			
Drive line			
Emergency equipment			
Engine			
Exhaust			
Fuel system			
Glass			
Horn			
Leaks			
Lights (state which)			
Reflectors			

Speedometer ....

Springs ....

Steering ....

Tires ....

Wheels ....

Windshield wiper ....

Any other items requiring attention .....
.....

I hereby certify that on the .... day of .....
I carefully inspected the equipment described above and that this is a true and correct report of the result of such inspection.

.....
(Signature of person making inspection)

I hereby certify that on the date stated above the person who made the inspection covered by this report was competent and qualified to make such inspection and was duly authorized to make such inspection as a representative of .....

.....
(Name of authorized carrier)

.....
(Signature of carrier, partner, officer, safety director, or other supervisory employee responsible for safety compliance.)

Date.....

(d) *Identification of equipment as that of the authorized carrier.* The authorized carrier acquiring the use of equipment under this rule shall properly and correctly identify such equipment

during the period of the lease, contract, or other arrangement in accordance with the Commission's requirements in Part 1058 of this chapter (Identification of Vehicles). If a removable device is used to identify the acquiring authorized carrier as the operating carrier, such device shall be on durable material such as wood, plastic, or metal, and bear a serial number in the acquiring authorized carrier's own series so as to keep proper record of each of the identification devices in use.

(1) *Identification to be removed when lease terminated.* The authorized carrier operating equipment under this part shall remove any legend, showing it as the operating carrier, displayed on such equipment, and shall remove any removable device showing it as the operating carrier, before relinquishing possession of the equipment.

(2) *Certified statement may be carried on vehicle in lieu of lease.* Unless a copy of the lease, contract, or other arrangement is carried on the equipment, as provided in paragraph (a)(7) of this section, the authorized carrier or its regular employee or agent shall prepare a statement certifying that the equipment is being operated by it, which shall specify the name of the owner, the date of the lease, contract or other arrangement, the period thereof, any restrictions therein relative to the commodities to be transported, and the location of the premises where the original of the lease, contract or other arrangement is kept by the authorized carrier, which certificate shall be carried with the equipment at all times during the entire period of the lease, contract, or other arrangement.

(e) *Driver of equipment to be in compliance with safety regulations.* Before any person other than a regular employee of the authorized carrier is assigned to drive equipment operated under this part, it shall be the duty of the authorized carrier to make certain that such driver is familiar with, and that his employment as a driver will not result in, violation of any provision of

the Motor Carrier Safety Regulations of the Federal Highway Administration of the Department of Transportation.

(f) *Record of equipment to be maintained; shipping documents to identify the authorized carrier.* The authorized carrier utilizing equipment operated under this part for periods of less than 30 days shall prepare and keep a manifest or other documents covering each trip for which the equipment is used in its service, containing the name and address of the owner of such equipment; point of origin, the time and date of departure, the point of final destination, and the authorized carrier's serial number of any identification device affixed to the equipment. During the time that equipment subject to this part is operated there shall be carried with the equipment, bills of lading, waybills, freight bills, manifests, or other papers identifying the lading, and containing the foregoing information, which shall clearly indicate that the transportation of the property carried is under the responsibility of the authorized carrier, which papers shall be preserved by the authorized carrier. This section shall also apply with respect to vehicles leased for periods of 30 days or more unless the required information is kept at a terminal or office as a part of the records of the authorized carrier.

[32 F.R. 20056, Dec. 20, 1967, as amended at 33 F.R. 2848, Feb. 10, 1968; 39 F.R. 6525, Feb. 20, 1974]

§ 1057.5 Interchange of equipment.

Authorized common carriers may by contract, lease, or other arrangement, interchange any equipment defined in § 1057.2 with one or more other such common carriers, or one of such carriers may receive from another such carrier, any of such equipment, in connection with any through movement of traffic, under the following conditions:

(a) *Interchange agreement to be specific.* The contract, lease, or other arrangement providing for interchange shall specifically

describe the equipment to be interchanged; the specific points of interchange; the use to be made of the equipment, and the consideration for such use; and shall be signed by the parties to the contract, lease, or other arrangement, or their regular employees or agents duly authorized to act for them, in the execution of such contracts, leases, or other arrangements.

(b) *Operating authority of carriers participating in interchange.* The certificates of public convenience and necessity held by the carriers participating in the interchange arrangement must authorize the transportation of the commodities proposed to be transported in the through movement and service from and to the point where the physical interchange occurs.

(c) *Through bills of lading required.* The traffic transported in interchange service must move on through bills of lading issued by the originating carrier, and the rates charged and revenues collected must be accounted for in the same manner as if there had been no interchange of equipment. Charges for the use of the equipment shall be kept separate and distinct from divisions of the joint rates or the proportions thereof accruing to the carriers by the application of local or proportional rates.

(d) *Safety inspection of equipment.* It shall be the duty of the carrier acquiring the use of equipment in interchange to inspect such equipment, or to have it inspected in the manner provided in § 1057.4(c). Equipment which does not meet the requirements of that paragraph shall not be operated in the respective services of the interchange carriers until the defects have been corrected. Where carriers interchanging equipment for a through movement of traffic are commonly controlled and jointly maintain and administer a uniform safety program, no such inspection at the point of interchange is required; *Provided,* That the equipment interchanged has been so inspected immediately prior to the start of the movement in which the interchange occurs and found to meet the requirements of § 1057.4(c).

(e) *Identification of equipment as that of the operating carrier.* Authorized carriers operating power units in interchange service shall identify such equipment in accordance with the Commission's requirements in Part 1058 of this chapter (Identification of Motor Carrier Vehicles). Any removable device used to identify the operating carrier shall be on durable materials such as wood, plastic, or metal, and shall bear a serial number in the operating carrier's own series and such carrier shall keep a proper record of each identification device in use. The authorized carrier operating equipment under this part shall remove any legend, showing it as the operating carrier, displayed on such equipment, and shall remove any removable device showing it as the operating carrier, before relinquishing possession of the equipment. Authorized carriers operating equipment in interchange service under this section shall carry with each vehicle so operated, except trailers and semitrailers, a copy of the contract, or other arrangement, while the equipment is being operated in the interchange service, unless a statement certifying that the equipment is being operated by it and identifying the equipment by company or State registration number, showing the specific point of interchange, the date and time of the assumption of responsibility for the equipment, and the use to be made of the equipment, is carried in the vehicle while it is operated in interchange service. Such statement shall be signed by the parties to the contract or other arrangement or their employees or agent.

(f) *Connecting carriers considered as owner.* An authorized carrier receiving equipment in connection with a through movement shall be considered the owner of the equipment for the purpose of leasing the equipment to other authorized carriers in furtherance of the movement to destination or the return of the equipment after the movement is completed.

[32 F.R. 20056, Dec. 20, 1967, as amended at 33 F.R. 2848, Feb. 10, 1968]

§ 1057.6 Rental of equipment to private carriers and shippers.

(a) *Rental of equipment with drivers.* Unless such service is specified in their operating authorities, authorized carriers shall not rent equipment with drivers to private carriers or shippers, except where the vehicle so rented is to be used for transportation which may be performed for compensation within the exemption provisions of section 203(b) (7) or (8) of the Interstate Commerce Act.

(b) *Rental of equipment without drivers.* Authorized common carriers shall not rent equipment without drivers to private carriers or shippers and authorized contract carriers shall not so rent such equipment without first having obtained approval of the rental contract from this Commission, except that the prohibitions contained in this section shall not apply to authorized carriers transporting property wholly for and on the billing of railroads or where the vehicle so rented is to be used for transportation which may be performed for compensation within the exemption provisions of section 203(b) (7) or (8) of the Interstate Commerce Act.

PART 1058—IDENTIFICATION OF VEHICLES

Sec.

1058.1 Vehicles subject to regulation.

1058.2 Method of identification.

1058.3 Size, shape and color.

1058.4 Vehicles in driveaway service.

1058.5 Passenger vehicles.

1058.6 Use of identification plates prohibited.

AUTHORITY: The provisions of this Part 1058 issued under 49 Stat. 546, as amended, 566, as amended; 49 U.S.C. 304, 324.

SOURCE: The provisions of this Part 1058 appear at 32 F.R. 20059, Dec. 20, 1967, unless otherwise noted.

§ 1058.1 Vehicles subject to regulation.

Every for-hire motor carrier operating under authority granted pursuant to the Interstate Commerce Act (49 U.S.C., 1 et seq.), shall observe the rules and regulations prescribed in this part respecting each motor vehicle operating under such authority.

§ 1058.2 Method of identification.

There shall be displayed on both sides of each vehicle operated under its own power, either alone or in combination, except as otherwise provided in this part respecting vehicles in driveaway service and those used under a continuing interchange or lease arrangement between common carriers of passengers by motor vehicle, the name, or trade name, of the motor carrier under whose authority the vehicle or vehicles is or are being operated, and the certificate, permit, or docket number assigned to such operating authority by the Interstate Commerce Commission. Such certificate, permit, or docket number, or numbers, shall be in the following form: "I.C.C. .....", but shall not include any sub numbers which may have been assigned. If the name of any person other than the operating carrier appears on the vehicle operated under its own power, either alone or in combination, the name of the operating carrier shall be followed by the information required above, and be preceded by the words "operated by". Nothing in the regulations in this part shall prohibit display of such additional identification as is not inconsistent herewith.

§ 1058.3 Size, shape and color.

The display of name and number prescribed in this part shall be in letters and figures in sharp color contrast to the background and be of such size, shape and color as to be readily legible, during daylight hours, from a distance of 50 feet while the vehicle is not in motion, and such display shall be kept and maintained in such manner as to remain so legible. If desired, display may be accomplished through use of a removable device so prepared as otherwise to meet the identification and legibility requirements of the regulations in this part.

§ 1058.4 Vehicles in driveaway service.

If a removable device is used on vehicles in driveaway service, it either may be affixed on both sides, or, at the rear of the single driven vehicle. In the cases of a combination driveaway operation the removable device may be affixed on both sides of any one of the units comprising the combination, or at the rear of the rear-most unit of the combination.

§ 1058.5 Passenger vehicles.

Section 1058.1 to 1058.4 shall not apply to motor vehicles used in the transportation of passengers by common carriers when such vehicles are used in providing through transportation of passengers, in regular services over the authorized routes of two or more of such carriers under a continuing interchange or lease of equipment arrangement between such carriers, if the vehicle owner's name and certificate number is displayed thereon in the manner provided in § 1058.2, and if there shall have been filed with the office of the Regional Director or Directors having jurisdiction over such carriers and posted in each terminal and ticket agency on the involved routes a published schedule of the carriers showing clearly the points or places between which each carrier assumes and bears complete control and responsibility for the operation of the interchanged or leased vehicle.

§ 1058.6 Use of identification plates prohibited.

On and after the effective date hereof, identification plates theretofore issued by the Interstate Commerce Commission shall not be displayed on any motor vehicle operating under authority of the Commission or otherwise.

Board's Decision and Direction of Election

Dated January 11, 1971.

Board Case 10-RC-8225

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

DEATON, INC.

Employer,

and

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL #623, AFL—CIO,

Petitioner.

Case 10-RC-8225.

DECISION AND DIRECTION OF ELECTION.

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before

Hearing Officer Alan L. Rolnick of the National Labor Relations Board. Following the hearing, and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, this case was transferred to the National Labor Relations Board for decision. Thereafter, the Employer and the Petitioner filed briefs, which have been duly considered.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c) (1) and 2(6) and (7) of the Act.

The Petitioner seeks to represent a unit of all over-the-road truckdrivers, city pickup and delivery drivers, hostelers, and maintenance employees at the Employer's Birmingham, Alabama, facility. The Employer contends that the petition should be dismissed, primarily on the basis that the unit includes certain over-the-road truckdrivers who, it urges, are independent contractors, and others who, it claims, are employees only of these independent contractors.

The Employer is a Delaware corporation with its principal office and place of business located at Birmingham, Alabama, where it is engaged in the transportation of goods in interstate commerce as a common carrier under license from the Interstate Commerce Commission. The Employer utilizes about 400

truckdrivers: about 35 individuals drive Deaton-owned trucks, 16 are local drivers and hostelers (yardmen), and about 355 individuals own and/or drive trucks leased by Deaton.

The following are the various categories of owners and drivers of trucks *leased* by Deaton:

a. *Single Owner-Drivers:* These drivers own and operate a single truck, which they drive and lease to Deaton.

b. *Multiple Owner-Drivers:* These individuals own more than one truck leased to Deaton. A multiple owner-driver normally drives one of his leased vehicles.

c. *Nonowner-Drivers:* These drivers drive the trucks leased by Deaton.

The Employer is authorized to operate as an interstate motor vehicle common carrier under a Certificate of Public Convenience and Necessity granted by the Interstate Commerce Commission. In its operations, the Employer is subject to the Interstate Commerce Act and to the regulations promulgated by the ICC, and is further subject to pertinent regulations of the Department of Transportation. Under the Interstate Commerce Act, a carrier is permitted to augment its equipment by means of leases, but the carrier is not thereby relieved from certain duties and responsibilities imposed by the Interstate Commerce Act.

The relationship between the Employer and the truck owners and nonowner-drivers is based on the terms of a lease entitled "Lease Agreement between Deaton, Inc., and Independent Contractor." The term of the lease is 1 year, and from year to year thereafter, unless terminated by either party upon written notice after having been in effect for 30 days. The lease provides that the "contractor agrees to furnish, upon request of 'carrier' the equipment . . . and all labor to operate the same, and to perform all services necessary in the transportation of such com-

modities as 'carrier' may provide." The lease further provides that the "Contractor warrants that the motor vehicle be in safe mechanical and operating condition"; that such vehicle will be maintained by the "contractor"; that said equipment is properly licensed; and that the equipment meets the rules and regulations of the ICC and all other regulating authorities and local, state, and other appropriate agencies.

It is further provided that the "Contractor" agrees to pay the entire cost of operating the vehicle, including wages, payroll taxes, workmen's compensation, fuel tax payments, road tax, equipment use fees, equipment license fees, driver's license fees, fuel, oil, gasoline, tires, parts, repairs, driver's salary, fines, tolls, state license tags, and pay collision, fire, and theft insurance premiums. However, Deaton, by virtue of the lease, is authorized to withhold sums from an owner in default on any monetary obligation imposed on him by the lease.

It is further provided that the contractor shall "provide all labor and service herein provided for, or employ all necessary drivers, helpers, mechanics or others competent and qualified to perform the work required hereunder, and meeting the requirements of the rules and regulations of Federal, State, and local regulatory authorities," and shall "Direct and control his employees, including selecting, hiring, supervising, firing, training, setting wages, hours and working conditions and paying and adjusting the grievances of his employees." The lease agreement provides that the "carrier" shall pay the "contractor" certain set percentages of the gross revenue, which, in practice, the record indicates, amounts uniformly to 70 percent for the lease of a tractor and trailer, and 60 percent for the lease of a tractor alone.

Under the lease arrangement, certain duties and responsibilities are imposed upon the "Contractor" *vis-a-vis* the "Carrier." Thus, the "Contractor" agrees, at his expense, to furnish

"Carrier" with the driver's current medical certificate, copy of all daily driver's logs, driver's trip report and manifest, and such other reports or forms as may be required by the Interstate Commerce Commission and United States Department of Transportation, and in such detail as may be required by such rules and regulations; the "Contractor" agrees on delivery of any property transported by him to secure signed delivery receipt therefor and on completion of trip, furnish same to "carrier"; and "Contractor" further agrees to collect all moneys due "carrier" for transportation service rendered pursuant hereto. The record also reflects that the owner of a vehicle leased to Deaton may not drive that vehicle for another Company.

The drivers report to the Employer's dispatcher for the various hauls. They "sign in" when they desire to make a haul. The lease owners hire their own drivers, but the drivers are, nevertheless, "checked out" by the Employer's personnel office. In the event a driver does not perform to Deaton's expectations, such as being consistently late, being insulting to the customers, drinking on the job, Deaton asks the lease operator not to utilize the driver on the Employer's runs.

The owners of the leased vehicles invest about $20,000 in each truck. The multiple owner-drivers may, apparently, lease to the Employer as many trucks as they may wish, consistent with the Employer's requirements. Thus, for example, one multiple owner-driver leases about 43 trucks to the Employer, and the record indicates that while some multiple owner-drivers are successful operators, others have gone into bankruptcy. The leased trucks normally bear decals stating "leased to Deaton."

All pay and conditions of employment of drivers are a matter of agreement between the truck owner and the driver he employs. Thus, the employment terms of company drivers and drivers of leased equipment are not necessarily uniform. The Company does not withhold any state or Federal income tax or social security tax from the sums paid owners or their drivers,

nor does it cover their workmen's compensation or unemployment compensation. Owners and their drivers receive no vacation or holiday pay from the Company and do not participate in welfare plans or other company benefits enjoyed by the Company's employees.

In making determinations as to whether an individual is an independent contractor or employee, the Board has frequently stated that it will apply the common law right-of-control test.[1] Under this test, the employer-employee relationship exists when the employer reserves the right to control not only the ends to be achieved, but also the means to be used in reaching such ends. The Board has made it clear that the application of the test is not a "perfunctory exercise" but demands a balancing of all the evidence relevant to the relationship.[2]

In *Deaton Truck Lines, Inc., supra,* the Board considered this very issue, and concluded, with court approval,[3] that the lease owners and their drivers were not independent contractors but employees of Deaton. The Employer now claims that changes in operations occurring after the decision have materially altered the nature of its relationship with the lease

---

[1] Our dissenting colleague does not appear to question our reliance on the common law right-of-control test as the proper means of resolving the independent contractor issue before us. Yet, our colleague's own conclusions are based upon an application of the more restrictive standards set forth in *U. S. v. Silk (Harrison, Collector of Internal Revenue v. Greyvan Lines, Inc.)*, 331 U. S. 704. The relevancy of this test to issues arising under the National Labor Relations Act has been previously considered by the Board in its earlier decision involving the same employer and the identical issue now before us. See *Deaton Truck Lines, Inc.*, 143 NLRB 1372. For the reasons set forth in that decision, we shall continue to adhere to the common law right-of-control test as the standard for determining independent contractor status.

[2] *National Freight, Inc., Federal Freight, Inc., and Sun Transportation, Inc.*, 153 NLRB 1536, 1538-39.

[3] *Deaton Truck Line, Inc. v. N. L. R. B.*, 337 F. 2d 697 (C. A. 5).

owners and that they now have the status of independent contractors. In this connection the Employer relies upon the facts that (1) wages and benefits of lease drivers are determined by the lease owner and hence are not necessarily the same as those enjoyed by company drivers; (2) unlike company drivers, lease drivers purchase gas where they please, may vary routes, and may take their trucks home; and (3) the Employer no longer maintains a pool of drivers, nor a road patrol.

In our opinion, the foregoing are insufficient to negate the considerable control exercised and reserved in the Employer over the manner and means by which the lessors perform their services on the Employer's behalf. The Employer remains obligated to comply with ICC and Department of Transportation regulations relative to the operation of all vehicles used in its operations on the Nation's highways and concededly, exercises the control over operation of leased equipment necessary to assure compliance with said requirements. Furthermore, the Employer, being answerable to its customers for any unsatisfactory performance by a lease operator or his driver, will, in turn, take corrective steps with the lease owner to avoid any repetition of such incidents.

More specifically, the Employer's control over the means by which the lease owners perform their tasks is evidenced by its initial determination of qualification of any driver hired by a lease owner, by its disqualification of any driver who fails to perform satisfactorily, by its requiring leased equipment to be inspected every 20 days, by its exclusive use of all leased equipment for the term of the lease, and by its performance of all dispatching services for both company and lease drivers alike. Also, the lease drivers are required to submit a daily driver's log and trip report and manifest to the Company; each truck is required to exhibit the Employer's name and identification number; and Deaton maintains a personnel file on all drivers with respect to accidents and qualifications. Furthermore, the

Employer, through its authority to terminate the lease at will 30 days after the commencement thereof, retains potential authority to control virtually every aspect of the means by which the lease owners conduct their operations in its behalf.

It is true, as the Employer points out, that the truck owners have an opportunity to increase their profits. Thus, for example, the owners may save money on the purchase of their trucks and minimize maintenance costs; they may purchase as many trucks for leasing purposes as they can afford; and they may engage in other business activity on their own behalf. But, as we have seen, by virtue of the uniform system of remuneration provided in all the leases between the Employer and the lessors, the Employer in practical effect sets the amounts the truck owners receive from the Employer for hauling the Employer's freight. Moreover, the fact that the truck owners may earn extra money through purchase of additional trucks, or through other business activity, although a factor to be considered, does not preclude an employee relationship with the Employer.[4]

In view of the foregoing, and on the basis of the entire record, we find that the single owner-drivers and the non-owner-drivers, including those driving for the multiple owners, are employees of the Employer.[5]

4. Although we find that the multiple owner-drivers are not independent contractors, we conclude that they are supervisors within the meaning of the Act. The record shows that the multiple owner-drivers, as in the prior *Deaton* case, *supra*, have the power to hire and fire the drivers of their trucks, and otherwise responsibly to direct their work and work assignments. We shall therefore exclude them from the unit.

Accordingly, and since no other issues have been presented concerning the scope of the unit, we find that the following

---

[4] See *Indiana Refrigerator Lines, Inc.*, 157 NLRB 539.

[5] *Indiana Refrigerator Lines, supra.*

employees constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All over-the-road truckdrivers, city pickup and delivery drivers, hostlers, and maintenance employees at the Employer's Birmingham, Alabama, plant, excluding all office clerical employees, salesmen, guards, and supervisors as defined in the Act.

DIRECTIONS OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for Region 10 shall direct and supervise the election, subject to the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended. Eligible to vote are those described in the unit herein who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been perma-

nently replaced.[6] Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Service Employees International Union, Local #623, AFL-CIO.

Dated, Washington, D.C., Jan. 11, 1971.

JOHN H. FANNING, *Member,*
GERALD A. BROWN, *Member,*
HOWARD JENKINS, JR., *Member*
(SEAL) NATIONAL LABOR RELATIONS BOARD.

CHAIRMAN MILLER, dissenting:

Contrary to the majority, I would find that the owners of equipment leased to the Employer are independent contractors and hence would dismiss the petition seeking an election in a unit which includes them.

The majority, in finding that the owner-operators are employees, applies the right-of-control test and concludes that Deaton has retained sufficient control over the manner and means by which the owner-operators perform their duties to establish

---

[6] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236; *N. L. R. B. v. Wyman-Gordon Co.*, 394 U. S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 10 within 7 days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

an employment relationship. In so finding, the majority relies in essence upon the following: the overall effect of ICC regulations, which require a degree of company control over the equipment and certain safety factors applicable under the law administered by that agency; the lease agreement providing for the Company's exclusive use of the leased equipment (also required by ICC regulations); the fact that either party may terminate the lease on 30 days' notice; drivers are required to submit a daily driver's log and a trip report manifest to the Company (again an ICC requirement); each truck is required to exhibit the Company's name and identification number; the Company may effectively remove a driver from company work (but only when required because of noncompliance with ICC regulations); and, finally, the fact that the Company maintains a personnel file on the drivers with respect to accidents, etc.

I have no quarrel with the *relevance* of the common law "right-of-control" test to the issues at hand. My disagreement centers upon the majority's application of this test to the facts of this case, coupled with its failure also to consider and give weight to factors establishing the entrepreneurial status of those they find to be employees.

Soon after passage of the Wagner Act, the Board with Court approval,[7] adopted liberal standards, designed to afford as many individuals the protection of the Act as would be consistent with industrial realities. "The standard was one of economic and policy considerations within the labor field. Congressional reaction to this construction of the Act was adverse and Congress [in 1947] passed an amendment specifically excluding 'any individual having the status of an independent contractor' from the definition of 'employee' contained in § 2(3) of the Act. The obvious purpose of this amendment was to have the Board and courts apply general agency principles in distinguishing between employees and

[7] *N. L. R. B. v. Hearst Publications*, 322 U. S. 111.

independent contractors under the Act." *N.L.R.B. v. United Insurance Co. of America*, 390 U.S. 254 at 256.

Also in 1947, but before the effective date of the 1947 amendments, the Supreme Court in *U. S. v. Silk (Harrison, Collector of Internal Revenue v. Greyvan Lines, Inc.), supra*,[8] considered this issue, and on facts strikingly similar to those presented here, concluded that owner-operators under contract with a common carrier subject to regulation by the Interstate Commerce Commission were independent contractors and not employees.

The facts in *Greyvan* were: Respondent operated a trucking business pursuant to ICC regulations. The driver-owners were required to haul exclusively for the respondent, to furnish their own trucks and all equipment and labor necessary for pickup, to handle and deliver shipments, to pay all expenses of operations, to furnish such insurance as the respondent might specify, to pay for all loss or damage to shipments and to indemnify the company for any loss caused by the acts of the truckmen, their servants, and employees, to paint the respondent's name on their trucks, to collect money, to post bonds, to drive their trucks personally or to be present on their trucks except in emergencies, when a substitute might be employed with approval by the company, and to follow the rules and regulations of the company. They were paid on a percentage of revenue basis. The contract between the company and the owner-drivers was terminable at will. The company maintained dispatchers but did not specify the routes to be

---

[8] Though the *Silk* and *Greyvan* cases arose under the Social Security Act, the Court, at page 713, specifically stated that it would follow the principles applied in making similar determinations under the National Labor Relations Act. Although the Court relied upon the more liberal standard set forth in the earlier *Hearst* case, subsequently modified by Congress, the ruling, that those who perform services on behalf of another and bear all the earmarks of independent businessmen, do so as independent contractors, remains valid law.

used. Permits, certificates, and franchises required by law were obtained at the company's expense.

On these facts the Court concluded: "where the arrangements leave the driver-owners so much responsibility for investment and management, . . . they must be held to be independent contractors. These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors." 331 U.S. at 719.

The majority here, in finding a degree of control fatal to the independence of the contractors, errs first in failing to note that virtually the only controls retained were those required by the ICC. For example, it notes that the Company may "effectively remove a driver from company work." An examination of the facts reveals, however, that such a removal can be effectuated *only* when required by the law, and that in all other cases, as provided in the lease, "Contractors shall . . . direct and control his employees, including selecting, hiring, supervising, firing, training, setting wages, hours and working conditions and paying and adjusting the grievances of his employees."

As further specifically delineated by the lease:

> Parties hereto agree that "carrier" has no authority to or right to control the details of the operation of the leased equipment, and any agent or servant of "carrier" is without authority to control said operation, except to the extent required by law and to accomplish the end result for which this lease is executed.

The majority thus fails to observe the teaching of *Greyvan* that the retention of only so much control as is required by

operation of law (when a carrier is subject to ICC regulations) clearly does *not* establish an employer-employee relationship. In any given case, therefore, it becomes necessary to examine *beyond* this point, and to explore and analyze what degree of control is retained and exercised beyond that required by the law of transportation. This the majority fails to do, and this would be reason enough for me to dissent.

But the majority, in its haste to find employee status, also ignores the other test set forth in *Greyvan,* which is given emphasis under our law by the legislative history of the 1947 amendments to our Act.

Consistent with *Greyvan,* that legislative history clearly implies that the distinction between employer and independent contractors cannot, in any event, be based solely upon the element of control. Thus, as stated in House Report No. 245:

> In the law, there always has been a difference and a big difference, between "employees" and "independent contractors." "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for the goods, materials, and labor and what they receive for the end result, that is, upon profits.[9]

Upon examination of the instant facts in the light of the foregoing, the conclusion that the lease owners are independent contractors appears inescapable. The lease owners invest substantially—about $20,000 per truck. Some are profitable, others have gone bankrupt. The opportunity for profit or loss clearly depends on the initiative and the ability of the owners to operate their trucks efficiently and economically; the expenses are largely borne by them, not Deaton (fuel, oil, tires,

---

[9] See I Leg. Hist. 309 (1947). See also H. R. Conf. Rep. No. 510, 80th Cong. 1st Sess. 33, I Leg. Hist. 536-537 (1947).

repairs, wages of other drivers and helpers, taxes, etc.). The business-like nature of the opportunity for the owner-drivers is shown by the fact the more successful ones become multiple owners and may own, as does one contractor here, as many as 43 trucks (the investment for such an owner would be over three-quarters of a million dollars). The fleet owners have complete autonomy in establishing the wages and working conditions under which their drivers perform. None of the typical indicia of an employment relationship are present. The lease owners and their employees are not subject to the wage or fringe benefit policies applicable to Deaton's own employees. They are engaged in an independent enterprise performing services under contract with Deaton.

When the instant record is measured against the standards set forth in *Greyvan* and the legislative history to the 1947 amendments, the lease owners must be found to be independent contractors. Accordingly, I would dismiss the petition seeking to include them in the unit[10]

Dated, Washington, D. C., Jan. 11, 1971.

EDWARD B. MILLER,
Chairman,
NATIONAL LABOR RELATIONS BOARD.

---

[10] It is true that the Board in an earlier case involving this Employer found the driver-owners to be employees. See *Deaton Truck Line, Inc., supra.* That decision was enforced by the Fifth Circuit at 337 F. 2d 697. However, in the interim, significant changes have been made through which the Employer relinquished considerable control over the wages and benefits of lessee drivers, over route designations, and over the source through which owner-drivers obtain their employees, and appears to have retained only such control as is required by the ICC. Furthermore, the court's decision in that case was made pursuant to limited standards of review which bound the court to accept the Board's determination ". . . even though the Court would justifiably have made a different choice had the matter been before it *de novo.*" See *N. L. R. B. v. United Insurance Co. of America, supra,* p. 13.

Administrative Law Judge's Decision

Dated January 31, 1973.

Board Case 10-CA-9765

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

DEATON, INC.,

and

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL #623, AFL-CIO.

Case 10-CA-9765.

Donald W. Davis, Esq., for the General Counsel.

Mark Taliaferro, Jr., Esq., and Mark Taliaferro, Sr., Esq., both of Birmingham, Ala., for the Respondent.

Mr. Mike McKeown, Birmingham, Ala., for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT COHN, Administrative Law Judge: Upon a charge filed by Service Employees International Union, Local No. 623,

AFL-CIO (herein the Union), on August 31, 1972,[1] against Deaton, Inc. (herein the Respondent or Company), a complaint and notice of hearing was issued by the Regional Director for Region 10 on September 15. The complaint alleged, in essence, that since on or about May 12, the Company has refused to bargain with the Union as exclusive bargaining representative of the Company's employees in an appropriate unit, in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (herein the Act). By its duly filed Answer, Respondent admitted the jurisdictional allegations of the complaint and inferentially admitted the refusal to bargain. It defended its position in its Answer on the grounds that the "unit certified was inappropriate, that it included independent contractors, . . ."

The matter was heard before me in Birmingham, Alabama, on November 16, with all parties present. At the close of the hearing oral argument was waived, but a post-hearing brief has been filed with me by counsel for the Respondent, which has been duly considered.

Upon the entire record herein, including arguments of counsel, I make the following:

FINDINGS OF FACT

I. The Business of the Respondent

Respondent, a Delaware corporation, with its principal office and place of business located at Birmingham, Alabama, is engaged in the business of transportation of goods in interstate commerce as a common carrier under license from the Interstate Commerce Commission. During the past calendar year, which period is representative of all times material herein, Respondent received more than $50,000 from the interstate transportation of freight.

---

[1] Unless otherwise indicated, all dates refer to 1972.

Based upon the foregoing facts, I find, as Respondent admits, that it is, and has been at all times material herein, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

The only issue in this proceeding is whether Respondent unlawfully refused to bargain with the Union as the certified representative of its employees in an appropriate unit. The facts are undisputed, and may be summarized as follows:

Pursuant to a decision and direction of election by the Nation Labor Relations Board dated January 11, 1971,[2] an election by mail ballot was conducted by the Regional Director for Region 10 from February 1 through February 23, 1971. On February 26, 1971, the ballots were tabulated and the parties were furnished a tally of ballots which showed that of approximately 314 eligible voters, 108 cast valid votes for and 94 cast valid votes against the Union, and 16 cast challenged ballots. There was one void ballot. The challenged ballots being sufficient in number to affect the results of the election, and the employer subsequently having filed timely objections to the election, the Regional Director conducted an investigation into these matters.[3]

On May 10, 1971, the Regional Director issued his report on objections and challenged ballots. In such report, the Regional

---

[2] Case 10-RC-8225.

[3] The objections related solely to the manner in which the Regional Director conducted the election, *i.e.*, by mail.

Director recommended to the Board that the challenges to the ballots of four employees be sustained and that the objections of the employer be overruled. He further found that since the tally of ballots showed that a majority of valid votes had been cast for the Union, a certification of representatives be issued. The Board, on August 26, 1971, overruled the Company's exceptions to the Regional Director's report, and certified the Union as the exclusive bargaining representative of the employees in the unit theretofore found appropriate.[4]

Thereafter, there were several informal meetings held between the Company's attorney and the representative of the Union looking towards the possibility of holding formal negotiating sessions. At these meetings the Company's attorney took the position that the Company was willing to bargain for the "people who we admitted were our employees" but were not willing to bargain concerning those "people that we considered independent contractors."[5] The union representative took the position that the Union was certified as bargaining representative for all of the employees in the unit and they were the individuals whom he intended to bargain for.

The evidence discloses that on May 12, the union representative sent the Company attorney a telegram requesting a

---

[4] The appropriate unit, as found by the Board in the original decision (187 NLRB No. 102) included:

> All over-the-road truck drivers, city pickup and delivery drivers, hostelers, and maintenance employees at the employer's Birmingham, Alabama, plant, excluding all office clerical employees, salesman, guards, and supervisors as defined in the Act.

In so finding, the Board determined that the single owner-drivers and the nonowner-drivers were employees of the Employer rather than independent contractors, as contended by the Company.

[5] The company attorney took the position that he could not bargain for those persons because "I didn't pay their wages and I didn't pay their insurance and I didn't set the hours of work, that the other fellow did it."

meeting "at the earliest possible convenience for the purpose of negotiating contract for Deaton drivers." The Company never responded to that telegram and no meetings were ever held.

ANALYSIS AND CONCLUDING FINDINGS

Respondent in its brief argued that the Board, in a decision issued subsequently to its decision in the instant case, altered its position with respect to the question of whether certain drivers were "employees" or "independent contractors," and that, therefore, the decision in the instant case must be reappraised. In support of its position, it cites the Board's decision in *Fleet Transport Company, Inc.*, 196 NLRB No. 61.

In *Fleet*, the Board applying the "common law right of control test," determined that certain drivers utilized by the employer in that case were "independent contractors" rather than "employees." The Board stated that "the resolution of this question depends on the facts of each case, with no one factor being determinative."

Even were I to conclude (which I do not) after a reading of both cases that "Deaton's case involves a stronger case for independent contractors than *Fleet Transport Company*"[6] I still would deem myself bound by the Board's decision in the representation case involving this Respondent. Accordingly, I reject the Respondent's defense and therefore find and conclude that at all times since May 12 it has failed and refused to bargain with the Union as the certified representative of Respondent's employees in an appropriate unit, in violation of Section 8(a)(1) and (5) of the Act.

---

[6] Respondent's brief, at page 2.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section I, above, occurring in connection with Respondent's operations described in section III, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, it shall be construed that the initial year of certification begins on the date the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F. 2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All over-the-road truckdrivers, city pickup and delivery drivers, hostelers, and maintenance employees at Respondent's Birmingham, Alabama, plant, excluding all office clerical employees, salesmen, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. By virtue of a Board certification dated August 26, 1971, Service Employees International Union, Local No. 623, AFL-CIO, has been, and now is, the certified and exclusive representative of all of the employees in the appropriate unit described above for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on and after May 12, 1972, to bargain in good faith with the aforesaid Union concerning wages, rates of pay, hours, and other terms and conditions of employment. Respondent has engaged in and is now engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings and conclusions, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[7]

---

[7] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Rela-

ORDER

Respondent, Deaton, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Service Employees International Union, Local 623, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All over-the-road truckdrivers, city pickup and delivery drivers, hostlers, and maintenance employees at Respondent's Birmingham, Alabama, plant, excluding all office clerical employees, salesmen, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request bargain with the above-named labor organization as the exclusive representative of all the employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

---

tions Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order and all objection thereto shall be deemed waived for all purposes.

(b) Post at its Brimingham, Alabama, plant, copies of the attached notice marked "Appendix."[8] Copies of said notice on forms provided by the Regional Director for Region 10, shall, after being duly signed by an authorized representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and be maintained for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered. defaced, or covered by any other material.

(c) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this recommended Order what steps the Respondent has taken to comply herewith.

Dated at Washington, D. C., Jan. 31, 1973.

ROBERT COHN,
Administrative Law Judge.

APPENDIX
NOTICE TO EMPLOYERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with SERVICE EMPLOYEES INTERNATIONAL

---

[8] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

UNION, LOCAL NO. 623, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

> All over-the-road truckdrivers, city pickup and delivery drivers, hostelers, and maintenance employees at the employer's Birmingham, Alabama, plant, excluding all office clerical employees, salesmen, guards, and supervisors as defined in the Act.

DEATON, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 2102 City Federal Building, 2026 Second Avenue North, Birmingham, Ala. 35203 (Tel. No. 205-325-3877).

Board's Decision and Order Dated June 1, 1973.

Board Case 10-CA-9765.

File

Exec. Sec. 0

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

DEATON, INC.,

and

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 623, AFL-CIO.

Case 10-CA-9765.

DECISION AND ORDER

On January 31, 1973, Administrative Law Judge Robert Cohn issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the ruling, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and thereby orders that Respondent, Deaton, Inc., Birmingham, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D. C., Jun. 1, 1973.

JOHN H. FANNING, *Member,*
HOWARD JENKINS, JR., *Member,*
(SEAL) NATIONAL LABOR RELATIONS BOARD.

CHAIRMAN MILLER, dissenting:

As I stated in my dissenting opinion in the underlying representation case (187 NLRB 780), I consider the lease owners involved herein to be independent contractors rather than employees of the Respondent. In my view, therefore, we had no authority to certify the Union as the representative of such nonemployees, and Respondent Company has no obligation to bargain with the Union concerning their wages, hours, or other terms and conditions of employment. I would therefore dismiss the complaint in its entirety.

Dated, Washington, D. C., Jun. 1, 1973.

EDWARD B. MILLER, *Chairman,*
NATIONAL LABOR RELATIONS BOARD.

Board Order Denying Request Dated July 6, 1973.

Board Case 10-CA-9765.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

DEATON, INC.

and

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 623, AFL-CIO.

Case 10-CA-9765.

ORDER DENYING REQUEST.

On June 1, 1973, a three-member panel of the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding[1] in which it adopted the findings, conclusions and recommendations of the Administrative Law Judge, as contained in his Decision dated January 31, 1973, and ordered that the Respondent take the action set forth in the recommended Order of the Administrative Law Judge.

Thereafter, on June 21, 1973, the Respondent filed a Request for Reconsideration, requesting that the matter be submitted to the entire Board.

The Board having duly considered the matter,

---

[1] 203 NLRB No. 172.

IT IS HERBEY ORDERED that the Respondent's motion for reconsideration by the entire Board be, and it hereby is, denied.[2]

IT IS FURTHER ORDERED that the Respondent's Motion for Reconsideration be, and it hereby is, denied as presenting nothing not previously considered.

Dated, Washington, D. C., July 6, 1973.

By direction of the Board:

GEORGE A. LEET,
Associate Executive Secretary.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

DEATON, INC., Respondent.

No. 73-3084.

United States Court of Appeals,
Fifth Circuit.

Oct. 25, 1974.

Application for enforcement of an order of the National Labor Relations Board (Alabama case).

Before BROWN, Chief Judge, and GODBOLD and RONEY, Circuit Judges.

GODBOLD, Circuit Judge:

---

[2] See *Enterprise Industrial Piping Company*, 118 NLRB 1.

This National Labor Relations Board refusal to bargain case requires us to examine the validity of a 1971 representation proceeding order designating a bargaining unit of employees of Deaton, Inc., an irregular route interstate common carrier.[1] The heart of the case is the question of whether drivers of trucks owned by others and leased to Deaton were properly included in the unit. We conclude that in the 1971 order the Board did not employ improper legal standards and its findings are supported by substantial evidence. Thus the 1973 order directing Deaton to bargain must be enforced.

[1] Independent contractors are excluded from the coverage of the National Labor Relations Act, 29 U.S.C. § 152(3), and a bargaining unit lumping them with "employees" is inappropriate. In the representation proceeding the Board designated as an appropriate unit of employees of Deaton:

> All over-the-road truckdrivers, city pickup and delivery drivers, hostelers, and maintenance employees at the Employer's Birmingham, Alabama, plant, excluding all office clerical employees, salesmen, guards, and supervisors as defined in the Act.

The Board opinion, 187 N.L.R.B. No. 102, 76 L.R.R.M. 1129, summarized in 1971 CCH NLRB ¶ 22,635 (Jan. 11, 1971), shows that "over-the-road truckdrivers" included these subgroups:

> Drivers of Deaton-owned trucks, conceded to be "employees."

---

[1] As usual, the issue of the validity of the representation proceeding order comes before us in the context of a subsequent unfair labor practice case in which, in 1973, the Board held Deaton guilty of refusal to bargain with Service Employees Local 623, AFL-CIO, the duly elected and certified representative of the unit. *See* 203 N.L.R.B. No. 172, 83 L.R.R.M. 1294, summarized in 1973 CCH NLRB ¶ 25,421 (June 1, 1973).

> Single-truck owner-drivers. A single-truck owner-driver owns only one truck, which he leases to Deaton and drives himself.
>
> Nonowner drivers. A nonowner driver drives a truck leased to Deaton by a third person.[2]

Deaton urges that the unit is inappropriate because single-truck owner-drivers are independent contractors. Nonowner drivers are conceded to be employees, but Deaton claims that multiple-owner drivers are independent contractors, and that they [i.e., the multiple-owner drivers] rather than Deaton are the employers of the nonowner drivers.[3]

[2, 3] The Act does not define independent contractor. The Board and the courts flesh out the term by application of common law agency principles. NLRB v. United Ins. Co., 390 U.S. 254, 88 S.Ct. 988, 19 L.Ed.2d 1083 (1968). The de-

---

[2] The third person owns two or more trucks. Often he drives one himself, while the other(s) are driven by nonowner drivers. The Board decision referred to such third persons in the aggregate as "multiple-owner drivers," and excluded them from the unit upon the ground that they are supervisors.

The drivers of Deaton-owned trucks number 35 to 50. Around 350 trucks are leased to Deaton. The record does not show how many of these are driven by single-truck owner-drivers and how many by nonowner drivers or multiple-owner drivers.

[3] The status of single-truck owner-drivers is stated as a separate issue, but at all stages of the proceedings the parties and the Board have not differentiated it from the issue of nonowner drivers' status. Thus everyone has assumed that if nonowner drivers are employees, single-truck owner-drivers perforce are employees too. That assumption is justified. The Board opinion concluded that the nonowner drivers were sufficiently under Deaton's control to make them Deaton's employees under common law agency principles. Undergirding the Board's conclusion was the finding that Deaton, through its power to unilaterally cancel multiple-owner drivers' leases, could force them to act as conduits for company control over nonowner-drivers. To the extent Deaton had indirect control over nonowner drivers, it had direct control over single-truck owner-drivers, who were signatories of the uniform lease that multiple-owner drivers signed.

termination of a worker's status involves no special expertise peculiar to the Board. But when made by the Board in the first instance under correct principles and following briefs, oral argument, and a hearing with witnesses, the determination should not be set aside merely because the court of appeals would, as an original matter, decide the case the other way. The court must canvass the entire record in the search for substantial evidence and must not displace the Board's choice between two fairly conflicting views. *Id.* at 260, 88 S.Ct. 988, 19 L.Ed.2d at 1088, citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

While asserting that agency principles are applicable, the Supreme Court has made clear that there is no shorthand formula or magic phrase that yields easy answers in close cases. NLRB v. United Ins. Co., *supra*, 390 U.S. at 258, 88 S.Ct. 988, 19 L.Ed.2d at 1087. Rather, all incidents of the relationship between the worker and the company must be assessed and weighed The resultant decision is "not a purely factual finding . . . but involve[s] the application of law to facts. . . ." *Id.* at 260, 88 S.Ct. at 991, 19 L.Ed.2d at 1088.

[4] Our own employee-independent contractor cases,[4] Board decisions[5] and cases from other circuits[6] have refined the agency

---

[4] *E. g.*, Deaton Truck Line, Inc. v. NLRB, 337 F.2d 697 (CA5, 1964), cert. denied sub nom. Teamsters Local 612 v. NLRB, 381 U.S. 903, 85 S.Ct. 1448, 14 L.Ed.2d 285 (1965); NLRB v. Lindsay Newspapers, Inc., 315 F.2d 709 (CA5, 1963); NLRB v. Steinberg, 182 F.2d 850 (CA5, 1958).

[5] *E. g.*, NLRB v. Nu-car Carriers, Inc., 189 F.2d 756 (CA3, — L.R.R.M. —, summarized in 1966 CCH NLRB ¶ 20,248 (Mar. 9, 1966) (before the full Board).

[6] *E. g.*, NLRB v. No-car Carriers, Inc., 189 F.2d 756 (CA3, 1951); NLRB v. Cement Transport, Inc., 490 F.2d 1024 (CA6, 1974); Joint Council of Teamsters No. 42 v. NLRB, 146 U.S.App. D.C. 275, 450 F.2d 1322 (1971); Radio City Music Hall Corp. v. United States, 135 F.2d 715 (CA2, 1943) (tax case; opinion by Learned Hand); NLRB v. Jewell Smokeless Coal Corp., 435 F.2d 1270 (CA4, 1970).

law inquiry. The "control test," which we will discuss more fully *infra*, has emerged as an important desideratum. It is not, however, the sole analytical tool.[7] The Board opinion in the present case shows that other factors were weighed. For example, the company's and drivers' own declarations about their relationship, voiced in the governing uniform leases, were considered, as was the fact that the company extends employee-type life and health insurance and pension benefits only to drivers of company-owned trucks, not to single-truck owner-drivers or nonowner drivers.

The dissenting member of the Board panel, Chairman Miller, argued for giving more weight to the entrepreneurial character of the owner-drivers' operations. He cited United States v. Silk, 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947), a Social Security tax case in which the Supreme Court held that certain moving-van drivers had so much responsibility for investment and management that they were independent contractors.

The Board majority considered the extent to which multiple-owner drivers and single-truck owner-drivers are entrepreneurs, investing a substantial amount of cash, bearing the risk of loss, and enjoying the hope of profit. *Silk* itself demonstrated that entrepreneurial indicia are not necessarily to be accorded paramountcy and that the "total situation" must be evaluated. 331 U.S. at 719, 67 S.Ct. 1463, 91 L.Ed. at 1771. Cf. Joint Council of Teamsters No. 42 v. NLRB, 146 U.S.App. D.C. 275, 450 F.2d 1322 (1971) (per curiam) (entrepreneurial indicia are significant primarily because they imply control).

Nearly every case examining the employee-independent contractor distinction involves an alignment of investment and man-

---

[7] *Cf., e. g.,* News-Journal Co. v. NLRB, 447 F.2d 65 (CA3, 1971), in which the Third Circuit frowned on the Board's practice of expressing its conclusion solely in terms of the control test, but held that the record showed that the Board had in fact given due consideration to other factors.

agement responsibility departing in some degree from the classic employer-salaried employee model. The various factors bearing on the "total situation" frequently point in conflicting directions. We cannot say that in the present case the board majority gave undue weight to the control test or shortchanged entrepreneurial indicia.

The control test is traditionally stated in the following terms:

> [The test focuses on] the nature and the amount of control reserved by the person for whom the work is done . . . [T]he employer-employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished . . . [I]t is the right and not the exercise of control which is the determining element.

NLRB v. Phoenix Mutual Life Ins. Co., 167 F.2d 983, 986 (CA7), cert. denied, 335 U.S. 845, 69 S.Ct. 68, 93 L.Ed. 395 (1948). The Board and the courts have tended to emphasize particular phrases from the test. For example, numerous decisions have stressed that a company's right to control, even if not exercised, makes workers employees. See, e.g., Deaton Truck Line, Inc. v. NLRB, 337 F.2d 697 (CA5, 1964), cert. denied sub nom. Teamsters Local 612 v. NLRB, 381 U.S. 903, 85 S.Ct. 1448, 14 L.Ed.2d 285 (1965) [*Deaton*]. Also, the distinction between control over manner and means and control over end results has been made to bear considerable weight. Thus in NLRB v. Steinberg, 182 F.2d 850 (CA5, 1958), animal trappers who leased tracts from the company, worked them during a brief season, and sold pelts to the company, were held to be independent contractors because there was no substantial evidence that the company had significant control over the manner and means of accomplishing the production of pelts.

In interstate truck line cases an additional wrinkle on the control test has evolved. The Interstate Commerce Commission and the Department of Transportation closely regulate truck lines. The leading purposes of the regulations are to promote safe operation of trucks and to ensure continuous financial responsibility so that truck-related losses will not go uncompensated. The regulations, designed to protect both the highway-travelling public and the segment of the public directly using trucking services, have the effect of requiring the holder of a certificate of public convenience and necessity to possess and exercise considerable control over all trucks operated under the certificate, without regard to whether the holder owns the trucks.[8] Control over trucks involves control over drivers. We agree with the Board that it is unnecessary to decide whether ICC-mandated controls alone would be sufficient to establish the employee status of nonowner drivers of leased trucks. In the present case the Board took into account the substantial nexus of control required by federal regulations and also found that the facts established the existence of "additional controls" voluntarily reserved by Deaton. Thus the Board found that the total controls were sufficient to make out em-

---

[8] ICC-mandated control over trucks not owned by the carrier was intended by Congress, which authorized the Commission

> to prescribe, with respect to the use by motor carriers . . . of motor vehicles not owned by them, in the furnishing of transportation of property—
>
> * * * * * * *
>
> (2) such . . . regulations as may be reasonably necessary in order to assume that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment.

49 U.S.C. § 304(e).

ployee status. We follow the same approach. See NLRB v. Pony Trucking, Inc., 486 F.2d 1039 (CA6, 1973).

At the 1970 hearing before the Hearing Examiner, Deaton pointed out the changes in the relationship between the drivers and the company that had intervened since 1963, when in *Deaton I* we agreed with the Board that single-truck owner-drivers and nonowner drivers driving Deaton-leased trucks were employees. The changes, many of which were effected by redrafting the uniform lease, included the following: company-paid vacations and hospital, life and workman's compensation insurance were eliminated for all except drivers of Deaton-owned trucks; the rate of pay for drivers of leased trucks was no longer fixed by the lease, and different multiple-owner drivers offered different pay rates and fringes; orientation and safety meetings were eliminated and company safety and driver supervision patrol operations curtailed; drivers of leased trucks were no longer reprimanded by Deaton, nor were they required to sign in personally before being dispatched or to follow company-prescribed routes; they were permitted to take extended leaves, to take equipment home, and to purchase fuel and repair and maintenance services and to sojourn overnight wherever they pleased; multiple-owner operators were allowed to lease trucks (other than those already under lease to Deaton) to other carriers, and to swap drivers from Deaton to other carriers; the prohibition against lease drivers' swapping loads so as to get loads consigned in the direction of their homes was lifted; the practice of maintaining a pool of company-approved nonowner drivers upon which multiple-owner drivers were required to draw was eliminated.

The 1971 Board decision took account of the changes but found that considerable control remained vested in Deaton. The Employer remains obligated to comply with ICC and Department of Transportation regulations relative to the operation of all vehicles used in its operations on the Nation's high-

ways and concededly, exercises the control over operation of leased equipment necessary to assure compliance with said requirements. Furthermore, the Employer, being answerable to its customers for any unsatisfactory performance by a lease operator or his driver, will, in turn, take corrective steps with the lease owner to avoid any repetition of such incidents.

More specifically, the Employer's control over the means by which the lease owners perform their tasks is evidenced by its initial determination of qualification of any driver hired by a lease owner, by its disqualification of any driver who fails to perform satisfactorily, by its requiring leased equipment to be inspected every 20 days, by its exclusive use of all leased equipment for the term of the lease, and by its performance of all dispatching services for both company and lease drivers alike. Also, the lease drivers are required to submit a daily driver's log and trip report and manifest to the Company; each truck is required to exhibit the Employer's name and identification number; and Deaton maintains a personnel file on all drivers with respect to accidents and qualifications. Furthermore, the Employer, through its authority to terminate the lease at will 30 days after the commencement thereof, retains potential authority to control virtually every aspect of the means by which the lease owners conduct their operations in its behalf. 187 N.L.R.B. No. 102 at . . ., 76 L.R.R.M. at . . . .

Despite Deaton's urging to the contrary, we cannot ignore or discount the items that are requirements imposed by federal regulations.[9] As discussed above, we assess the total controls, including both ICC-mandated controls and additional controls. The Board's findings that Deaton possessed the federally-man-

[9] The Board listed as a control factor the performance by Deaton of dispatching services for drivers of leased trucks as well as drivers of Deaton-owned trucks. In finding substantial evidence of sufficient total controls over the manner and means of achieving the transportation of goods from one place to another, we place no reliance upon this factor.

dated controls are supported by substantial evidence, and we would in any event be bound to assume that the company was in compliance with regulations. The existence of additional controls also is shown by substantial evidence. For example, Deaton "checks out" all drivers before permitting them to drive trucks leased from multiple-owner drivers. 49 C.F.R. §§ 391.21 and 391.23 require Deaton to make certain inquiries, but the record shows that Deaton went farther than was required. D. B. Lockridge, Deaton's president, gave the following testimony before the Hearing Examiner:

> Q. [By the union attorney] How do you determine if a driver of a lease owner or a lease owner meets the qualifications of Deaton?
>
> A. Well, I thought I had explained that. We check him out. We check his references where he worked, check his police record, his driving record. And this we determine
>
> . . .
>
> Q. How is this filed? How was this filed with the company? How does the company have this?
>
> A. The lease operator—the lease operator presents a man to the personnel department and says, "I want this man checked out to drive my truck." We take the man's name, the record of his previous employment, and we check him out. And then we tell the lease operator, "He checks out all right" or "he doesn't check out all right."
>
> If he doesn't check out all right, we tell him he has a record of accident that are a mile long, he's had five chargeable accidents that directly contributed to—by negligence, recklessness, and we don't think you want him driving your trucks, and we know we don't want him driving a truck for us and subjecting us to lawsuits, and claims and penalties.

Thus it appears that Deaton had power over the hiring decisions of its multiple-owner drivers. Nor was the scope of this power limited to forbidding the hiring of persons legally disqualified from driving motor vehicles under federal regulations, as Lockridge's further testimony shows:

> Hearing Officer: Before an owner driver or a multiple owner driver has someone drive their vehicle, must that person file an application with Deaton?
>
> Witness: Not necessarily an application. We want to know some history on it so that we can check him out and determine what his past record is.
>
> Hearing Officer: And once again, the purpose of that is for liability insurance?
>
> Witness: The purpose of that is to determine whether or not his record is such that you wouldn't—he wouldn't be—he would be a good risk, whether or not his record is such that a federal regulatory agency; the Department of Transportation, to be specific, would not be critical of our operators.

Deaton's practice of assessing whether a driver was a "good risk" involved a subjective, employer-like inquiry different in quality from merely making sure he was not barred by law from commercial driving.

Deaton's power over multiple-owner drivers' personnel decisions continued beyond the initial determination of qualification stage. There is evidence that for lateness in making deliveries, for dishonest handling of money collected from customers, or for "just loafing," a nonowner driver can, in effect, be fired by Deaton. After a lease has been in force for 30 days (the minimum lease period allowed by regulations, see 49 C.F.R. § 1057.4(a)(3)), either party may terminate it at will upon written notice. As the Board noted in its opinion, this

gives the company a handle by which to control nonowner-drivers. By threatening a multiple-owner driver with cancelation of his lease, Deaton can make him fire a driver whom it considers undesirable.

> Q. [By the union's attorney] If you tell a lease owner to get another driver and he doesn't do it, do you disqualify that driver?
>
> A. Do I disqualify the driver?
>
> Q. Right. You tell a lease owner to get another driver and he says, "No, I don't want to do that. I want to keep this driver."
>
> A. Well, we tell him that he's perfectly free to keep him, but not driving a truck that's leased to us.
>
> [Deaton's attorney] That's what we call him disqualifying from driving in the fleet.

There was some evidence that the company exercised its power only for dishonesty or violations of state or federal regulations that would in any event make it illegal to keep the offending driver on. There was also testimony that other, more subjectively defined transgressions triggered exercise of the power.[10] Even if dishonesty were the only behavior that normally led to "disqualification" (i.e., firing by Deaton), the fact remains that the company had the power to disqualify nonowner drivers if it became dissatisfied with their perform-

---

[10] Q. [Deaton's attorney] Now, if a person violates safety regulations or fails to account for his money, or don't take his load there and just loafs, and had more th[a]n ample time to get there, do we at times disqualify that man from further driving in the Deaton fleet?

A. [Lockridge] Yes, we do. If he's dishonest, he steals from the company. We tell the lease operator we will not permit them to drive a truck leased to us, that he has the choice of either furnishing another driver or cancelling the lease on the truck, whichever he chooses to do, or if he has other trucks leased elsewhere he may put them somewhere else.

ance. Under the control test, the right of control, even if unexercised, is the crucial element.

Moreover, it appears that Deaton possessed and exercised less drastic means of asserting control over certain aspects of non-owner drivers' conduct.

> Hearing Officer: Have you ever had any of your customers complain about any of the drivers of vehicles bearing the Deaton insignia?
>
> Witness [Lockridge]: Oh, yes. Yes, we've had customers to tell us, "Don't send that blankety-blank so and so back in here anymore. If you do, we're not going to load it, or if you do, we're not going to unload it." And this is true with company drivers and this is true with lease operator's drivers.
>
> Hearing Officer: What you do when this happens?
>
> Witness: Well, we tell the lease operators that he cannot go back to Plant X because they refuse to load it, refuse to permit him on their premises.. And if he wants to have somebody else load at Plant X when that man's time comes to load, fine. But we will not permit that man to go back to Plant X, or we'll load the trailer for him.
>
> Hearing Officer: What about the driver for someone who leases a vehicle to you?
>
> [Deaton's attorney]: That's what he was talking about.
>
> Hearing Officer: Multiple owner driver. You go to that multiple owner and say, "Don't send Driver X to Customer Y"?
>
> Witness: Well, we tell him that we can't send him back there for loading or unloading because of the complaint registered by the customer, and it's up to him what he's going to do from there on. If he wants to retain the

> man as a driver on his truck and pay us to load for him, we'll do so. If he wants to load for him himself, he may do so, but we will not send the driver back to that place of business and we would not permit the driver to go back to that place of business after being instructed by the shipper not to send that particular individual back to his premises.

[5] In sum, substantial evidence drawn from the record as a whole supports the Board's conclusion that single-truck owner-drivers and nonowner-drivers, being "employees," were properly included in the bargaining unit. The Board's finding represents, at the least, a "fairly conflicting view" which we are not empowered to displace.

[6] Deaton asks us to remand the case for rehearing by the entire Board[11] on the ground that the 1971 decision is out of harmony with subsequent Board cases. Even if subsequent cases reaching the opposite result are truly indistinguishable, it is not our province to insure an abstract and academic consistency in Board decisions. The personnel and philosophies of administrative bodies are subject to constant change. Especially in an area as fraught with technical distinctions and as dependent on fact findings as the employee-independent contractor dichotomy,[12] we should decline to interfere with a Board decision reached through orderly processes under proper legal standards and supported by substantial evidence. To intervene at this point would work against the essential policy

---

[11] The 1971 order was handed down by members Fanning, Jenkins, and Brown, with Chairman Miller in dissent. Member Brown has since left the Board, and two new members, Penello and Kennedy have joined it.

[12] Cf. Maxwell Co. v. NLRB, 414 F.2d 477 (CA6, 1969), in which the Sixth Circuit noted that while the Board has consistently followed the control principle in deciding employee versus independent contractor questions, it has evolved new ways of evaluating the facts and thus has reached differing results.

of the Act, encouraging parties to delay compliance with Board orders for as long as possible in the hope of finding support in later Board decisions and of securing a *locus poenitentiae* through the intervention of a court of appeals.

[7] The 1973 order does not violate § 8(d) of the Act, 29 U.S.C. § 158(d), the prohibition against requiring a party to make a bargaining concession. The company's theory is that the order compels it to yield the concession of exercising control over matters, wages of nonowner drivers, for instance, that it presently does not control.[13] It contended that the Board should let negotiations be confined to the things upon which the Board focused in finding company control and thus employee status, for example, multiple-owner drivers' hiring and firing decisions. This contention misses the point. If the total controls were sufficient to support a finding of employee status—and we agree with the Board that they were—then the workers must be regarded as employees for all purposes. We need not speculate about the mechanics of the bargaining process or the form that an agreement ultimately might take. Those matters depend upon what each party offers and what each is able to secure in the way of concessions from the other.[14]

The order of the Board is enforced.

---

[13] After the election Deaton informally offered to bargain over all subjects that it controlled. We agree with the Board that this amounted to no more than a reassertion of the position that single-truck owner-drivers and nonowner drivers were not Deaton employees.

[14] We do not share Deaton's sense of the incongruity of making an employer bargain about matters over which in the past it has lacked the usual type of full control. We note that Deaton itself and other truck lines with similar structures have been required by the Board and the courts to bargain with units including single-truck owner-drivers and nonowner drivers.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

DEATON, INC., Respondent.

No. 73-3084.

United States Court of Appeals,
Fifth Circuit.

Jan. 15, 1975.

Application for Enforcement of an Order of the National Labor Relations Board (Alabama Case).

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Oct. 25, 1974, 5 Cir., 1974, 502 F.2d 1221).

Before BROWN, Chief Judge, and GODBOLD and RONEY, Circuit Judges.

PER CURIAM:

The second sentence of footnote 14 of the opinion is corrected to read: "We note that other truck lines with similar structures have been required by the Board and the courts to bargain with units including single-truck owner-drivers and nonowner drivers.

In all other respects the Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is denied.

United States Court of Appeals
For the Fifth Circuit

National Labor Relations Board,
Petitioner,
v.
Deaton, Inc.,
Respondent.
No. 73-3084

JUDGMENT

Before: BROWN, Chief Judge, and GODBOLD and RONEY, Circuit Judges.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, Deaton, Inc., its officers, agents, successors, and assigns, on June 1, 1973. The Court heard argument of respective counsel on April 23, 1974, and has considered the briefs and transcript of record filed in this cause. On October 25, 1974, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said Order of the National Labor Relations Board in said proceeding be enforced and that Deaton, Inc., its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

Entered: Nov. 21, 1974.

Issued as Mandate: Jan. 23, 1975.

MAY 31 1975

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1295

DEATON, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

ANDREW J. THOMAS
C. V. STELZENMULLER
1600 Bank for Savings Building
Birmingham, Alabama 35203
Counsel for Petitioner

May 30, 1975

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1295

DEATON, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

Pursuant to Rule 24, paragraph 5 of the Rules of this Honorable Court, petitioner, Deaton, Inc., a corporation respectfully files this supplemental brief in order to call the Court's attention to the following new cases which give additional support to granting the writ of certiorari herein: *Lorenz Schneider Co. v. NLRB*, — F.2d —, 89 LRRM 2235, 76 LC ¶ 10,846 (2d Cir., April 30, 1975); and *Local 814, Teamsters v. NLRB*, — F.2d —, 89 LRRM 2197, 76 LC ¶ 10,828 (D. C. Cir., April 30, 1975).

Each of these cases rejects the approach of the Fifth Circuit in the case at bar, that it is none of the reviewing courts' business that the Board cases on employee v. independent contractor status of owner-drivers are in irreconcilable conflict, and that all the court should do is check the record to see if substantial evidence exists. The *Lorenz Schneider* case, reversing the Board finding of employee status, did so although expressly conceding that "We cannot say that here the Board had no basis for its conclusion"; and disapproved the tendency of some reviewing courts to inch away from the "pure agency law" test mandated by Congress in the Taft-Hartley Act by extending immunity to judicial review of Board decisions too far. In *Local 814, Teamsters,* the Court of Appeals for the District of Columbia specifically took note of the ostensible inconsistency of two Board decisions before it for review, on the employee v. independent contractor status of owner-drivers. The Fifth Circuit holds this inconsistency immaterial; to the contrary, the District of Columbia Circuit held this quite material. Two of the judges, a panel majority, remanded the cases to the Board for clarification; for an effort to distinguish the two cases and to explain why different results were reached in them. Chief Judge Bazelon, in a Concurring and Dissenting Opinion, described the Board decisions as "a maze of precedents with few standards for decision discernable", and voted against simply remanding the cases, as he considered that this would produce at best a "post hoc rationalization"; he said, "I would reverse the Board and remand for a thorough reconsideration of the doctrinal quicksand in this area." Manifestly these decisions have now produced a clear conflict among the courts of appeals on the matter of what judicial review is to be accorded to decisions of the National Labor Relations Board on this important and recurring question. Therefore another reason exists for granting the writ which did not clearly obtain when we filed our petition. Supreme Court Rule 19, paragraph 1(b). Petitioner respectfully requests that the Court consider particularly the *Local 814, Teamsters* case, *supra* as its holding is most strikingly different from

the holding below, as to what a reviewing court ought to do when faced with irreconcilable, or even ostensibly inconsistent, Board decisions.

Respectfully submitted

ANDREW J. THOMAS

C. V. STELZENMULLER
1600 Bank for Savings Building
Birmingham, Alabama 35203
Counsel for Petitioner

Certificate of Service

I hereby certify that on this 30th day of May, 1975, a copy of the Supplemental Brief of Petitioner was mailed, properly addressed and postage prepaid, to the Honorable Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, Washington, D. C. 20510, Counsel for the Respondent and to the Solicitor General of the United States, Washington, D. C. 20570.

C. V. STELZENMULLER

INDEX

Page

Opinions below 1
Jurisdiction 1
Question presented 2
Statute involved 2
Statement 2
A. Proceedings before the Board 2
B. The decision of the court of appeals 6
Argument 7
Conclusion 11

CITATIONS

Cases:

Aetna Freight Lines, Inc., 194 NLRB 740 9
Conley Motor Express, Inc. 197 NLRB 624 9
Deaton Truck Lines, Inc., 143 NLRB 1372, affirmed, 337 F. 2d 697, certiorari denied *sub nom. Teamsters Local Union 612* v. *National Labor Relations Board*, 381 U.S. 903 5
Enterprise Industrial Piping Co., 118 NLRB 1 9
Fleet Transport Company, Inc., 196 NLRB 436 6,8
Florida-Texas Freight, Inc., 197 NLRB 976 9
Local 814, Teamsters v. *National Labor Relations Board*, 512 F. 2d 564 8
Maxwell Company v. *National Labor Relations Board*, 414 F. 2d 477 9
National Labor Relations Board v. *United Insurance Co.*, 390 U.S. 254 7
Portage Transfer Co., Inc., 204 NLRB 787 9

Cases (continued): Page

Site Oil Company of Missouri v. *National Labor Relations Board*, 319 F. 2d 86 9

United States v. *Silk*, 331 U.S. 704 8

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*)

Section 2(3), 29 U.S.C. 152(3) 2
Section 2(11), 29 U.S.C. 152(11) 5
Section 8(a)(1), 29 U.S.C. 158(a)(1) 2,6
Section 8(a)(5), 29 U.S.C. 158(a)(5) 2,6

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1295

DEATON, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-110 - A-124) is reported at 502 F.2d 1221. The Board's decision and order (Pet. App. A-97 - A-108) are reported at 203 NLRB 1099; its decision and direction of election in the earlier representation proceeding (Pet. App. A-82 - A-96) are reported at 187 NLRB 780.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-126) was entered on November 21, 1974, and petitioner's timely request for rehearing was denied on January 15, 1975 (Pet. App. A-125). The petition for a writ of certiorari was filed on April 15, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that owner drivers and nonowner drivers of trucks leased to the company in this case are employees of the company, rather than independent contractors.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are:

> Sec. 2. When used in this Act—
>
> * * * * *
>
> (3) The term "employee" * * * shall not include * * * any individual having the status of an independent contractor * * *.
>
> * * * * *
>
> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

A. Proceedings before the Board

1. In April 1970, Service Employees International Union, Local 623, AFL-CIO filed a representation petition with the Board seeking to represent the Company's truck drivers. The Company contended that the requested unit contained individuals who were independent contractors

under Section 2(3) of, and thus not covered by, the Act (Pet. App. A-83). At the subsequent hearing conducted to determine the status of the individuals in question, the Board found the following facts:

The Company, an "irregular route" common carrier under license from the Interstate Commerce Commission (ICC), utilizes about 400 truck drivers; about 35 drive Company-owned trucks, and the bulk of the remainder, about 355, drive trucks leased by the Company. The drivers of trucks leased by the Company fall into three categories:

a. Single-Owner Drivers who own a single truck which they drive and lease to the Company.

b. Multiple-Owner Drivers who own and lease more than one truck to the Company, and normally drive one of the leased vehicles themselves.

c. Nonowner Drivers who drive trucks leased by the Company from a multiple owner. (Pet. App. A-83 -A-84.)

Under the Interstate Commerce Act, to which the Company is subject, a carrier is permitted to augment its equipment by means of leases, but the carrier is not thereby relieved from certain duties and responsibilities imposed by that Act (Pet. App. A-84). Thus, ICC regulations provide that the carrier which leases equipment must be responsible for the "exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto * * *" (Pet. App. A-70). Moreover, the carrier is also required to make certain that any driver of leased equipment "is familiar with, and that his employment as a driver will not result in, violation of any provision of the Motor Carrier Safety Regulations of the Federal Highway Administration of the Department of Transportation" (Pet. App. A-75 - A-76). The leased equipment must also bear the identity of the carrier (Pet. App. A-74 - A-75).

The lease which defines the relationship between the Company and the truck owners may be terminated by either party upon written notice, after having been in effect for 30 days (Pet. App. A-84). Under the lease, the truck owner agrees to pay the entire cost of operating the vehicle. However, the Company is authorized to withhold sums from a truck owner in default of any monetary obligation imposed on him by the lease (Pet. App. A-85). The lease also provides that the truck owner shall "provide all labor and service herein provided for, or employ all necessary drivers, helpers, mechanics or others competent and qualified to perform the work required hereunder, and meeting the requirements of the rules and regulations of Federal, State, and local regulatory authorities," and shall "[d]irect and control his employees, including selecting, hiring, supervising, firing, training, setting wages, hours and working conditions and paying and adjusting the grievances of his employees" (*ibid.*). The lease further provides that the Company shall pay the truck owner a certain percentage of the gross revenue, which, in practice, amounts uniformly to 70 percent for the lease of a tractor and trailer and 60 percent for the lease of a tractor alone (*ibid.*). The truck owner invests about $20,000 in each truck (Pet. App. A-86).

The drivers report to the Company's dispatcher for the various hauls, where they "sign in" prior to making a haul (Pet. App. A-86). The truck owners hire their own drivers, but new drivers are, nevertheless, "checked out" by the Company's personnel office.[1] In the event a driver does

---

[1]The Company president testified at the Board representation hearing that: "We check [the driver] out. We check his references where he worked, check his police record, his driving record" and "then we tell the lease operator, 'He checks out all right' or 'he doesn't check out all right'. If he doesn't check out all right, we tell [the lease operator] he has a record of accidents a mile long, he's had five chargeable accidents that are directly contributed to - by negligence, recklessness, and we don't think you want him driving your trucks, and we know we don't want him driving a truck for us and subjecting us to law suits, and claims and penalties" (Transcript of representation proceeding (R. Tr.) 59-60; Pet. App. A-119).

not perform to the Company's expectations, the Company tells the truck owner that it will not allow the driver to drive the truck leased to the Company and that the owner "has the choice of either furnishing another driver or cancelling the lease" (Pet. App. A-86; R. Tr. 37-40, 44, 77).

2. The Board (Chairman Miller dissenting) concluded that the nonowner drivers and single-owner drivers of leased trucks were employees of the Company, rather than independent contractors,[2] and thus included them in the bargaining unit sought to be represented by the Union.[3] Applying the common law right-of-control test, the Board found that, in addition to the pervasive control over the operations of the leased trucks required by federal regulations, "the Employer's control over the means by which the lease owners perform their tasks is evidenced by its initial determination of qualification of any driver hired by a lease owner, by its disqualification of any driver who fails to perform satisfactorily, by its requiring leased equipment to be inspected every 20 days, by its exclusive use of all leased equipment for the term of the lease, and by its performance of all dispatching services for both company and lease drivers alike" (Pet. App. A-88). Moreover, "the Employer, through its authority to terminate the

---

[2]The Board had reached the same conclusion in an earlier case involving the Company. *Deaton Truck Lines, Inc.*, 143 NLRB 1372, affirmed, 337 F.2d 697 (C.A. 5), certiorari denied *sub nom. Teamsters Local Union 612* v. *National Labor Relations Board*, 381 U.S. 903. The Board rejected the Company's contention that its operations had materially changed since the prior decision (Pet. App. A-87 - A-88).

[3]The Board further found that the multiple-owner drivers, though not independent contractors, were supervisors, within the meaning of Section 2(11) of the Act, 29 U.S.C. 152(11), and thus not properly included in the unit (Pet. App. A-89). No issue concerning that determination is raised here.

POOR COPY

lease at will 30 days after the commencement thereof, retains potential authority to control virtually every aspect of the means by which the lease owners conduct their operations in its behalf" (Pet. App. A 88 - A-89). In the Board's view, these elements of control by the Company outweighed the entrepreneurial functions assumed by the truck owner (Pet. App. A-89).

The Union won the ensuing representation election, and was certified as the bargaining representative for the Company's drivers, including the nonowner drivers and single-owner drivers of leased trucks (Pet. App. A-99 - A-100). The Company refused to bargain, and the Union filed unfair labor practice charges. A three-member panel of the Board (Chairman Miller dissenting) found that the Company had violated Section 8(a)(1) and (5) of the Act and ordered it to bargain with the Union (Pet. App. A-100 - A-101, A-102, A-108). The Company then filed with the Board a "Request for Reconsideration," requesting that the full five-man Board consider the status of the drivers of leased trucks and reconcile an alleged inconsistency between the instant case and the Board's decision in *Fleet Transport Company, Inc.*, 196 NLRB 436. The Board denied the Company's request "for reconsideration by the entire Board," and its request for reconsideration of the substantive issue on the ground that it "present[ed] nothing not previously considered" (Pet. App. A-109 - A-110).[4]

B. The Decision of the Court of Appeals

The court of appeals upheld the Board's decision and enforced its order, finding that "the Board did not employ improper legal standards and its findings are supported by substantial evidence" (Pet. App. A-111). The court stated:

---

[4]The administrative law judge had rejected the Company's contention that *Fleet* was dispositive of the instant case (Pet. App. A-101).

> Nearly every case examining the employee-independent contractor distinction involves an alignment of investment and management responsibility departing in some degree from the classic employer-salaried employee model. The various factors bearing on the "total situation" frequently point in conflicting directions. We cannot say that in the present case the board majority gave undue weight to the control test or shortchanged entrepreneurial indicia. [Pet. App. A-114 - A-115.]

The court added:

> We agree with the Board that it is unnecessary to decide whether ICC-mandated controls alone would be sufficient to establish the employee status of non-owner drivers of leased trucks. In the present case the Board took into account the substantial nexus of control required by federal regulations and also found that the facts established the existence of "additional controls" voluntarily reserved by Deaton. Thus the Board found that the total controls were sufficient to make out employee status. We follow the same approach. See *NLRB* v. *Pony Trucking Inc.*, 486 F.2d 1039 (CA6, 1973). [Pet. App. A-116 - A-117.]

ARGUMENT

1. In *National Labor Relations Board* v. *Unitea Insurance Co.*, 390 U.S. 254, 258, this Court held that, in distinguishing between employees and independent contractors for the purposes of the Act, "common-law agency principles" are to be utilized. And the Court cautioned: "There are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor * * * In such a situation * * * there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must

be assessed and weighed with no one factor being decisive" (*ibid.*). The Court added that the Board's assessment "should not be set aside just because a court would, as an original matter, decide the case the other way"; rather, "the Board's choice between two fairly conflicting views" should be sustained (*id.* at 260).

As shown above, the Board applied common law principles and considered the total employment relationship in concluding that the drivers in question were employees. And the court of appeals, after scrutinizing the record, concluded, in a detailed opinion, that substantial evidence supported the Board's findings. In these circumstances, no issue warranting further review is presented.[5]

2. Nor is a different conclusion required by petitioner's contention (Pet. 12-21) that it was denied due process because the Board decision here is contrary to the results reached by other panels of the Board in factually indistinguishable cases. The cases relied on by petitioner do not support its contention.[6]

Thus, *Fleet Transport Co.*, 196 NLRB 436, is not "indistinguishable" (Pet. 16) from the instant case. In *Fleet*, the Board found, *inter alia*, that disciplinary decisions were actually made by the owner-operators, rather than by

---

[5]Nothing in *United States* v. *Silk*, 331 U.S. 704 (Pet. 21), requires that the drivers here be deemed independent contractors. There the Court stated that the "total situation" (*id.* at 719) must be assessed, and pointed out that there "are cases * * * where driver-owners * * * have been held employees * * * " (*id.* at 718). The court below found that the Board was reasonable in concluding that *Silk* is factually distinguishable (Pet. App. A-114 - A-115).

[6]In *Local 814, Teamsters* v. *National Labor Relations Board*, 512 F.2d 564 (C.A. D.C.) (Pet. Supp. Br.), on the other hand, the court found that the Board's decision was "factually similar [to] and ostensibly inconsistent" with another recently decided Board case (*id.* at 567). Accordingly, the case was remanded to the Board for clarification. The court in *Local 814* did not refer to any alleged inconsistency with the present case.

the Company, as here (*id.* at 437, 438, 439). Compare *Aetna Freight Lines, Inc.*, 194 NLRB 740, 741 (Chairman Miller concurring), and *Florida-Texas Freight, Inc.*, 197 NLRB 976, 978, n. 7 (Chairman Miller concurring), where the Board found employee status based, *inter alia*, on company disciplinary authority similar to that here.[7] In short, as the Eighth Circuit has observed, "[a]bout all that the cases demonstrate is that the test for determining the status of workers is much easier to state than it is to apply, and that each case must stand or fall on its own peculiar facts. To attempt to reconcile the many cases dealing with the problem would be futile." *Site Oil Company of Missouri* v. *National Labor Relations Board*, 319 F.2d 86, 91 (C.A. 8). Accord: *Maxwell Company* v. *National Labor Relations Board*, 414 F.2d 477, 481 (C.A. 6).[8]

---

[7]Similarly in *Portage Transfer Co., Inc.*, 204 NLRB 787, 788-789 (Pet. 18), the Board, in finding independent contractor status, relied, *inter alia*, on the fact that "there is no evidence of discipline of or any attempts to discipline, either owners or drivers by the Employer." And in *Conley Motor Express, Inc.*, 197 NLRB 624, 626 (Pet. 17), the Board stated, *inter alia*, that "there is no pattern whatever of regular discipline of owner-operators for acting contrary to any prescribed means or method of operation designed by the Employer."

[8]There is no substance to petitioner's allegation (Pet. 16) that "inequality of application of the law" results from the policy of referring cases to panels. A Board panel decision is circulated to the nonparticipating members, who "note" or "clear" the decision prior to issuance. The nonparticipating members, like those on the panel, may request full Board consideration of the panel decision, and it is the Board's practice to honor such requests. Requests for reconsideration of a panel decision or for reconsideration by the full Board are normally acted on by the panel deciding the case. While such requests are not circulated to the nonparticipating members, it is the Board's practice to honor a request for full Board consideration by any member of the panel. See *Enterprise Industrial Piping Co.*, 118 NLRB 1. These procedures were followed in the instant case.

3. There is no merit to petitioner's contention (Pet. 21-22) that the court of appeals abdicated its responsibility to review the propriety of the Board's decision in this case. The passage relied on by petitioner[9] occurred after the court, in a detailed opinion, had concluded that "substantial evidence drawn from the record as a whole supports the Board's conclusion that single-truck owner-drivers and nonowner-drivers [were] 'employees' " (Pet. App. A-123). The passage was not addressed to that question but merely to petitioner's request that the case be remanded "for rehearing by the entire Board on the ground that the [instant] decision is out of harmony with subsequent Board cases" (*ibid.*).

---

[9]The court stated (Pet. App. A-123 - A-124):

> Even if subsequent cases reaching the opposite result are truly indistinguishable, it is not our province to insure an abstract and academic consistency in Board decisions. The personnel and philosophies of administrative bodies are subject to constant change. Especially in an area as fraught with technical distinctions and as dependent on fact findings as the employee-independent contractor dichotomy [footnote omitted], we should decline to interfere with a Board decision reached through orderly processes under proper legal standards and supported by substantial evidence. To intervene at this point would work against the essential policy of the Act, encouraging parties to delay compliance with Board orders for as long as possible in the hope of finding support in later Board decisions and of securing a *locus poenitentiae* through the intervention of a court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board.

JUNE 1975.